THE COMPLETE SYSTEM OF DIVORCE

Compiled by:

Mufti Abdul Jaleel Qasmi

Translated by:

Mufti Afzal Hussain Ilyas

Zam Zam

KARACHI-PAKISTAN

TALAAQ

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Foreword

All praise is due only for Allaah. We laud Him and beseech His aid and beg forgiveness from Him only and believe in Him and rely solely on Him. We seek salvation in Him from the evils of our inner selves and the vices of our actions. There is none to misguide one whom Allaah intends to guide and there is none to guide whom Allaah intends to mislead. I bear witness that there is no one worthy of worship but Allaah, the One who has no partner. I also testify that Hadhrat Muhammad (Sallahu Alahyi Wassalam) is the faithful servant and the Last Rasul of Allaah. May Allaah Ta'ala's mercy be on him, his family and his Sahabaah (Radia Allahu Anhum Ajmaeen) and may He bless them and raise their status.

Hadhrat Mufti Sayed Abdul Jalil's book on Talaaq (Divorce) has been published numerous times in the Indo – Pak sub continent due to its academic nature and clarity.

He ably discusses the philosophy of talaaq and its concept in other religions and countries. Then mentions the different types of talaaq and goes into each ones details.

Thereafter the talaaq laws are elucidated which occur under different and variant situations, circumstances and conditions.

Followed by the rules of reconciliation via revoking, fresh marriage, Khula, 'Halaalah'.

Then the regulations of Iddaat are adequately propounded upon and the circumstances causing and legalising annulment listed.

conducted his life in accordance to the Divine Laws and Commandments. In this fashion man progressed in his quest until the coming of the Final Messenger (sallallahu alaihi wasallam). Nabi (sallallahu alaihi wasallam) completed and perfected every respect and branch of Divine Laws. He had paid particular attention to marital life and he conveyed the principles thereof, so that man may reach the highest ranks and stages in their lineage and offspring. He also demonstrated and taught the various laws regarding maintenance, dowry, etc, so that the offspring of husband and wife be well based and established for generations to come. He (sallallahu alaihi wasallam) made clear the association between foster relations and outlined the rights of parents and children.

In some cases the consent was granted for a man to have more than one spouse. This established the philosophy which led to the safeguarding and protection of the chastity of both man and woman. Islaam has also fully outlined the equality that is imperative for the man with more than one wife, to exercise. His time, etc. has to be equally shared between the wives so that none of their rights are trampled upon and that no forum is created for complaints and grumbling. We have made brief mention of each of these matters under separate captions, in this Kitaab. However, we have explained in detail the topic of Talaaq, which is the object of this book, so that man may be saved from multifarious sins and immoralities arising out of adultery. He will not only be able to safeguard his private parts, but he will also save his progeny to come. This destruction and devastation has struck Europe and caused so much of damage that even an atom or hydrogen bomb would not be able to wreak.

THE STATUS OF NIKAH IN ISLAAM

Allaah Ta`ala had declared His Great favour on His slaves by stating: ***"And enter into Nikah with women that are pleasing to you."*** It is clear that the natural comfort for man lies in women. A normal, sane and intelligent man will choose a woman in order to establish marital ties. In this regard Allaah Ta`ala had completely considered this preference and natural desire of man. Man has been given the choice to choose. Nabi (sallallahu alaihi wasallam) has also outlined and enumerated the many benefits and virtues of Nikah. Nikah is regarded as a union of goodness and blessings in the Hadith:

"It is reported from Hadhrat Aishah (radhiallahu anha) that Nabi (sallallahu alaihi wasallam) said: 'Indeed the best and most blessed Nikah is that one which is free from difficulties (i.e. the simplest).'" [Baihaqi]

In another narration Nikah is referred to as half of Deen. Nabi (sallallahu alaihi wasallam) said:

"When the slave (of Allaah Ta`ala) marries, then he completes half his Deen. He should adopt Taqwa for the remaining half." [Mishkaat Shareef]

The author of *Mirqaat*, Mullah Ali Qaari (rahmatullahi alaihi), in explaining *"half of Deen"*, quotes from Allamah Ghazaali (rahmatullahi alaihi):

"And Imaam Ghazaali (rahmatullahi alaihi) said: 'The predominant destructive factors of one's Deen are the private parts and the stomach. One of these are satiated by Nikah, because in Nikah lies chastity and morality. It

is a fort from shaitaan and it saves one from the evil disease of lust. It curbs lusts and desires, keeps one gaze in check and it safeguards one's private parts." [Page 194, vol.6]

In one narration Nabi (sallallahu alaihi wasallam) referred to a man who has no wife and a woman who has no husband as *Miskeen (Poor/destitute).* The Sahaabah (radhiallahu anhum) asked if this will apply to a wealthy person. Nabi (sallallahu alaihi wasallam) replied in the affirmative and said that even a wealthy man with no wife is a *Miskeen* and a wealthy woman with no husband is a *Miskeenah.* [Jam`ul Fawaahid, page 216, vol.1]

In another Hadith, reported from Hadhrat Abdullaah Bin Abbaas (radhiallahu anhu) it is stated that Nikah is the best means of *Muhabbat (mutual love). "There is no love that can be compared to that love which exists between married spouses."* [Mishkaat]

Nabi (sallallahu alaihi wasallam) has granted Nikah the status of being a part of Deen and Imaan. Although from an external glance it appears that Nikah has no truck or connection with Imaan, but if one looks at the broader picture, then one will note the deep and intricate connection between the two. Nikah is related to external actions, but in reality it also plays a great role in the purification of the spiritual and internal self. It is for this reason that the Fuqahaa-e-Kiraam (rahmatullahi alaihim) have not only made mention of Nikah when discussing *Muaamalaat (mutual dealings)*, but they have included it in the discussion of *Ibaadaat (acts of devotion/worship).* Therefore, although it bears a relation to *Muaamalaat* in

some respects, it also bears a relation to *Ibaadaat* in another respect.

Allamah Ibn Nujaim Misri (rahmatullahi alaihi), the author of *Bahrur Raa`iq*, has commented sufficiently on this. Besides his own research, he also mentions the proofs of the author of *Badaa`i Wa Sanaa`i*, wherein it becomes apparent that Nikah has an integral relation to *Ibaadaat*. He states:

"And its (Nikah's) mentioning is immediately after (the chapter concerning) Ibaadaat, because it bears a close relation to it. (This relation is so close) That to be occupied in it (i.e. to make Nikah and establish a bond with a woman) is more virtuous than secluding oneself for Nafl Ibaadaat." [Page 76, vol.3]

In another place, he presents the research of the author of *Badaa`i*, together with his own [Page 14]:

"He writes explaining the status of a Sunnat Nikah that to be occupied in a marital communion is better than engaging in Nafl Ibaadat. He also states in this regard in 'Majma`ul Anhaar' that we grant preference to this over engaging in Nafl Ibaadat. There are numerous proofs stated for this in Badaa`i. Firstly, there is unanimity that Sunnat is granted preference over Nafl. Secondly, there are warnings given for the abandoning of Sunnat acts, whereas the same is not so for Nafl acts. Thirdly, this is such an act, which not only did Nabi (sallallahu alaihi wasallam) carry it out, but he did so with continuity, and he spent his life in this way. If isolation and engagement in Nafl Ibaadat were more virtuous, then Nabi (sallallahu alaihi wasallam) would most certainly have opted for

that. When the beauty and virtue has been established from Nabi (sallallahu alaihi wasallam), then all the more, it is to be adhered to by the Ummat, because in matters of Shariah, generality forms a basis, and for a special and unique act, a specific proof is required. Fourthly, Nikah is more virtuous than Nafl Ibaadat, because Nikah saves the naffs of man from base lust and desires. It also saves a woman from destruction, since she has no fear of sustenance, clothes and a home, hence she is able to devote all her time to her responsibility of rearing her children." [Bahrur Raa`iq, page 80, vol.3]

Owing to the research and study of this humble author, it has been concluded that Nikah is in principle, an Ibaadat. Hence, this Ibaadat cannot be concluded or perfected without the fulfilment of the rights of women like her dowry, maintenance, etc. which in principle are related to *Muaamalaat*. It is for this reason that it is also related to *Muaamalaat*. If we take Hajj as an example, it is Fardh on every wealthy person upon whom the conditions of Hajj are found. Hence, it is without doubt, an Ibaadat, which has no relation to *Muaamalaat*. When a person sets outs for the journey of Hajj, then he has to necessarily leave his domestic responsibilities behind. At the time of departure, he has to make arrangements for the maintenance of his wife and children until his return. This is included in his Fardh responsibilities. The crux of the discussion is that some things are the conditions and means towards others and have the status of being part of the perfection of that (former) thing. However, owing to this, no difference is affected in the reality of the former thing. It is for this reason that according to Imaam A`zam (Abu Hanifah) (rahmatullahi alaihi), Nikah is more virtuous than performing Nafl Salaat, on the proviso that

the conditions for a Nikah are fulfilled, whereas, Nafl Salaat is a clear Ibaadat. The greatest reason for this is that when a person makes Nikah, and he acquires a peaceful and serene disposition, then he will fulfil his natural desires in permissible avenues and means. He will understand it as his obligation to abstain from fornication, immorality and stray glances. After establishing a marital relation, at least these realisations will be imbued in a person. He will not become involved in any lewd relations and calamities. Experience confirms this. The Hadith Shareef is also a great testimony to this. In one narration, Nikah is referred to as a strong means of safeguarding one from calamities. Nabi (sallallahu alaihi wasallam) said:

"O assembly of youth! He amongst you who has the ability (to fulfil the rights of Nikah), should make Nikah. Because indeed, it the best for lowering the gaze and a fort for the private parts." [Mishkaat]

NIKAH AND BROTHERHOOD

The bond of Nikah was not merely established to safeguard lineage and progeny. In fact, through this bond, unity, affection and affiliation are created. We see that the boy is from one family and the girl from another. Notwithstanding this total unfamiliarity, a bond of (family) relations is established between them. All unfamiliarity (between them and their families) is effaced after this. A natural (and divinely instilled) love is created between the two of them, which is most certainly not a temporary one. It is nurtured and increased as time wears on. In the Qur`aan Majeed, Allaah Ta`ala describes this love and affection as follows:

"And from His Signs, indeed We have created for you from amongst yourselves spouses, so that you may live (beautifully) with them, and made between you affection and mercy."

From the Qur`aan Majeed and Ahaadith it is established that in the world, there is no other means and way whereby such total unfamiliarity is removed and replaced with an everlasting relation and love, such as Nikah. In fact, if one looks at the broader picture and considers the matter, it will be seen that within Nikah lies the functioning of the entire world and human relations. One will note that unity, congeniality, brotherhood, friendship and family relations are all intertwined in the philosophy of Nikah. Upon contemplation of the reality of Nikah, one will be constrained to conclude that Allaah Ta`ala had instilled and imbibed in the heart of every person the ability to have love and affection for another.

THE WISDOM OF NIKAH

The reality of the matter is that if there was no way and method whereby a man and a woman were able to establish a bond between themselves and if there were no limits and constraints placed on how and where a person may satisfy his/ her lusts and desires in a permissible way, then there would remain absolutely no distinction between man and animal. The society and dealings of the entire mankind would remain and continue to be filthy and impure.

However, Allaah Ta`ala had created mankind, and He has made a partner for every individual. He has also established, formulated and laid down specific limits and

laws of life whereby man has to be governed by. He has shown all this to us through His beloved servant, Muhammad (sallallahu alaihi wasallam). There lies a great treasure in the Qur`aan Majeed and the Ahaadith regarding the secrets and wisdoms of Nikah. It is greatly encouraged and taught as well. Allaah Ta`ala says:

"And it is He Who has created from (a drop of) water, man. He established for him (blood) family relations and in-laws. And your Rabb is All-Powerful." [Surah Furqaan, Aayat 54]
In another Aayat, Allaah Ta`ala says:

"And marry the single ones amongst you, and the pious from amongst your male and female slaves. If they are poor, then Allaah Ta`ala will enrich them through His Favour." [Surah Noor]

And now for the benefit of the readers, we will present a few Ahaadith:

"Make Nikah, establish family relations (through marriage), and increase (your progeny). Indeed, I will 'flaunt' with you over the other Ummats on the Day of Qiyaamah." [Mishkaat Shareef]

"Marry women for four (reasons); for her wealth, her lineage, her beauty and her Deen. Hold on to (choose) Deen!" [Mishkaat Shareef]

Humaid Bin Abeed reports from a lengthy narration of Hadhrat Anas (radhiallahu anhu), who said;

"Three persons came to the home of the wives of Nabi (sallallahu alaihi wasallam)...
'If such people approach you who are pious and upon whom you have faith of their trustworthiness, and they are unmarried, then make Nikah immediately. If you do not do this, then fitnah (mischief) will spread on earth and there will be great immorality.'"

All the above were the benefits, secrets and encouragement for Nikah. We will now return to and concentrate on the actual objective of this treatise.

THE REALITY OF TALAAQ

In the preceding pages we have learnt that Nikah is another term for establishing such a relation and bond, which ensures the existence of a lineage and progeny. Together with this it is a means of permissible fulfilment of one's desires and lusts, within the bounds and limits outlined by Allaah Ta`ala. This has been ordained so that the animalistic traits, which are inherent in man, may be satiated and so that man may not start looking askance for satisfaction, and so that he may be safeguarded from fornication, immorality and other such filthy acts. In this way, society will also be saved from the many evils. The bond and affection which is created by Nikah is one of sincerity and honesty, the effects and fruits of which are passed onto the coming progeny.

For the perpetuity of the calmness and tranquillity of society, the Shariah has also made permissible a distasteful thing such as Talaaq, which can be applied in certain unfortunate cases. The reason being that in some cases after a Nikah takes place a person is deprived of the benefits and comforts thereof, due to their weakness, due to their physical or natural abilities, due to their inability to cope with the habits and nature of others, or due to many other possible reasons. A veil is thrown over the merits and virtues of the opposite party. And then instead of love, affection and strengthening of family ties, hatred, animosity and revulsion are fostered. This leads to one's worldly life becoming a woeful existence. In this way, the unity, congeniality, etc. which married life was supposed to create, are all laid to waste and destroyed. In fact, such strife leads to the opposite effect. Due to this strained and difficult relation, a desperate need is created for

separation between the spouses. Islaam has permitted the concept of Talaaq for such delicate and trying occasions, so that each of the spouses may go their own ways and pass their lives in peace elsewhere.

THE WARNINGS AGAINST THE ISSUING OF TALAAQ

For this reason the Shariah has outlined detailed laws in this respect, so that it is not used (abused) at improper occasions, in fact it is only applied in cases of severe necessity. The present day philosophers have established through medical and scientific means that women are weaker than men in every respect as far as their physical make-up and body limbs is concerned. The physique and limbs of men are stronger than those of women. They have a stronger sense of restraint and will power, but notwithstanding this, they do not have the choice of issuing Talaaq without severe necessity and without having passed through certain stages (i.e. adopting preventive and reformatory measures). In fact in different ways they have been prevented from using this choice (of issuing Talaaq). If one studies well and contemplates over all the places in the Qur`aan Majeed where Talaaq is mentioned, then it will be deduced that the exercising of Talaaq is at first prevented, and as far as possible encouragement is given to save one from issuing Talaaq. The preservation of the union between husband and wife is emphasised and encouraged. They are advised to resolve their dispute in the case of differences. This is in fact encouraged. Allaah Ta`ala says:

"And those women from whom you fear disobedience, advise them. Separate from their beds and hit them

(lightly). If they obey you then do not seek upon then other means (of reformation)."

It is stated in another Aayat:

"And if a woman fears hostility from her husband or shunning, then there is no harm if they reconcile and make peace."

If, Allaah Ta`ala forbid, the relationship between the two of them becomes very strained or it falls in great danger then they are ordered as follows:

"And if you fear a split between the two then send an arbitrator from his family and an arbitrator from hers."

Further on, success is guaranteed if this arbitration is carried out with sincerity. From the above this much is established that prior to issuing a Talaaq the stages outlined above need to be explored. And then if there appears to be an absolute necessity then only one Talaaq be given. It can either be written or mentioned verbally. This opens the path for possible future reconciliation.

Whatever has been mentioned by Nabi (sallallahu alaihi wasallam) with regard to Talaaq is very explicit. Severe restrictions have been issued upon its use.

"It is reported from Ibn Hadhrat Umar (radhiallahu anhu) that Nabi (sallallahu alaihi wasallam) said: 'In the sight of Allaah Ta`ala the worst of all Halaal acts is Talaaq." [Mishkaat Shareef]

In one narration it has been mentioned that the fragrance of Jannat is Haraam on that woman who requests for a Talaaq. It is stated:
"Whichever woman asks her husband for Talaaq, the fragrance of Jannat is Haraam upon her." [Mishkaat Shareef, page 283]

In one narration reported by Abu Dawood there is a clear prohibition against the issuing of Talaaq. Nabi (sallallahu alaihi wasallam) said:

"Make Nikah (but) do not give Talaaq because Talaaq shakes the Arsh of Allaah Ta`ala."

Similarly in another narration Nabi (sallallahu alaihi wasallam) expressed severe disapproval at the inappropriate usage of Talaaq. Mahmood Bin Labeed, reports:

"Nabi (sallallahu alaihi wasallam) was informed about a man who gave his wife three Talaaqs simultaneously. He stood up in extreme anger and said: 'Is he playing with the Kitaab of Allaah Ta`ala, whilst I am present in your midst?'
A man stood up and asked: 'O Rasulullah (sallallahu alaihi wasallam) should I kill him?" [Mishkaat Shareef]

In another instance, it has been reported that it is a sin to issue Talaaq when the wife in the state of Haidh, although a Talaaq given in this state is valid. From the above-mentioned Ahaadith it is well established that Talaaq is a detestable act in the Sight of Allaah Ta`ala and His Rasool (sallallahu alaihi wasallam). Yet, it is surprising that a man who is the father of many children, issues

Talaaq for any small and insignificant reason, and then out of shame and regret he seeks a Fatwa in order to reconcile and patch up the damage he had caused. It is also established from this that the person who issues the Talaaq also detests and dislikes it.

WHY IS TALAAQ THE WORST OF ALL THE PERMISSIBILITIES?

The reality of the matter is that Shariah itself regards Talaaq as detestable. Consent has been granted for its use only in very extreme and severe cases. The reason for this is that if anyone uses Talaaq in any inappropriate case or he plays with it, or uses it as a tool to oppress the woman, then the nature and quality thereof is altered. In the Sight of Allaah Ta`ala this is then a distasteful and hated measure. This then, causes a separation and break-up between two families. It does not merely end here, but for future generations it leaves a bitter taste for all to bear. As a matter of interest it would be appropriate to outline the (mal-) treatment of women in the various modes and religions which were prevalent prior to the advent of Islaam. Islaam brought about a respite and granted honour to women. From this we will understand to what extent the use of Talaaq is allowed in the Shariah.

Allaah Ta`ala says:

"O people! Fear your Rabb, Who has created you from one soul and created therefrom its spouse, and spread therefrom many men and women." [Surah Nisaa]

It is established from the Qur`aan Majeed that the relationship between the husband and wife is indissolubly linked. Allaah Ta`ala says:

"They (women) are clothes for you and you are clothes for them."

The Qur`aan Majeed is explicit with regard to the rights of women. It has also set the right path for the partners. It encourages unity, congeniality, love and affection.

"And live with them beautifully. If you dislike (anything in) them, then it is possible that you like a thing, wherein Allaah has placed much good therein."

In this regard, there are also many Ahaadith. We will just present a few hereunder:

"It is reported from Hadhrat Abu Hurairah (radhiallahu anhu) that Nabi (sallallahu alaihi wasallam) said: 'He who believes in Allaah and the Last day, will not harm his neighbour and he will conduct himself excellently with his wife. Indeed they have been created from the ribs of man and the most crooked of all ribs is the uppermost one. If you attempt to straighten it, it will break. If you leave it as it is, then it will remain crooked. Therefore, be moderate and behave excellently towards them." [Mishkaat Shareef]

Another example of excellent dealings, where Nabi (sallallahu alaihi wasallam), notwithstanding his perfect sense of justice, feared himself coming short thereof, appears in the following narration of Hadhrat Aishah (radhiallahu anha):

"Rasulullah (sallallahu alaihi wasallam) used to take equal turns at each of his wives and he used to say: 'O Allaah! This is my (way of) distribution (of time, etc), over which I have control, do not chastise or take me to task for that which is not in my control or choice (i.e. my heart/feelings).'" [Jam`ul Fawaahid, page 234, vol.1]

"It has been reported from Hakeem Bin Muaawiyah who reports from his father: 'I asked: 'O Rasulullah (sallallahu alaihi wasallam), what are the rights of our wives over us?' Nabi (sallallahu alaihi wasallam) replied: 'That you feed her, when you eat, that you clothe her when you wear clothes, that you do not slap her across the face, that you not abuse her and (if the need arises) you do not separate from her except in your home.'" [Ahmad, from Bulooghul Maraam, page 77)

From the above-mentioned Aayaat, the rights of women, compassion towards them and the Islaamic etiquette and dealings with them are clearly expounded and presented. When Islaam has placed consideration and concern over even the 'little' things regarding co-existence with women, then it would be as clear as daylight to understand why Talaaq is the most detestable of all permissible acts. The Qur`aan Majeed and Hadith has issued severe warnings against abusing women and making them targets of abuse. The perpetrators of such heinous acts are assured of severe punishments in the Aakhirat (Hereafter).

THE LAWS OF TALAAQ AND ITS IMPORATNCE

The rectification and smooth functioning of society is achieved through Nikah. Mutual relations are

strengthened and people benefit from their offspring and progeny. Stern warnings have been issued against ill-treatment of women and excellent co-existence and character towards them have been encouraged. The soul finds peace and contentment in the fulfilment of the rights of one another. Keeping all this in consideration, Allaah Ta`ala has made permissible Nikah. Its basis, principles, benefits and wisdoms have been outlined in the preceding pages. In short, Nikah is a blessing to man, since it ensures a peaceful existence.

Similarly, Talaaq is also a blessing, which has been bestowed to man by Allaah Ta`ala. Sometimes, a Nikah holds misery and leads to a disruptive life and existence. Instead of deriving all the benefits envisaged by Nikah, there is only the opposite. Instead of strengthening bonds of relationship, there is only acrimony, etc., etc. In such cases, let alone the rights of fellow men which are ignored, even the rights that are due to Allaah Ta`ala suffers greatly. In all this hardship and grief, it becomes necessary at times to effect a separation between the spouses. In order to avoid all the inherent evils which comes with an 'explosive' relationship, Allaah Ta`ala has made permissible a detestable act such as Talaaq, in fact, in such cases it is advisable and desired.

If there was no such a thing as Talaaq, then there would have been millions of women who will have to spend their lives in abject misery and wretchedness. This in turn would ultimately result in their becoming embroiled and involved in many lewd acts and immoralities. This would not only be limited to them, the entire existence of man would become disorientated and end up in a shambles.

All thanks and praise be only due to Allaah Rabbul Izzat, who in His Infinite mercy and Grace has bestowed man with a great blessing and beneficial thing as Nikah has also balanced the equation and allowed for the exceptions, and made permissible Talaaq. Yes, this much must be properly understood that Nikah is not made with Talaaq in mind. In fact, it is supposed and meant to be an everlasting relationship until one's last breath. It is precisely for this reason that man has been warned greatly against severing this sacred and honourable bond. It has also been mentioned that the utterance of the word Talaaq shakes the Arsh of Allaah Ta`ala. It is reported in a Hadith:

"Make Nikah (but) do not give Talaaq because Talaaq shakes the Arsh of Allaah Ta`ala."

In order to safeguard and preserve this bond, Islaam has provided a solution, by having an arbitrator from the husband's family and one from the wife's family, in the event of a critical dispute. This will pave the way for reconciliation. At every instance Talaaq is kept out of the way. However, if all else fails and there is no way for any reconciliation, then the choice of Talaaq is there. Talaaq is also bound by proper Shar`i guidelines and laws. If it is utilised within these bounds and at the proper occasions and in the correct way, then there will be goodness and blessings in it for all concerned.

Before briefly explaining the Islaamic perspective of Talaaq and its laws, it would be appropriate to outline the methods practiced by other nations, so that one understands the customary ways, and appreciates the proper Islaamic method and wisdom.

TALAAQ IN THE DAYS GONE BY

Many oppressions and cruelties were loaded on the women of previous eras. They were severely abused and belittled. Even with regard to the matter of divorce, the women of the previous times were abused and deprived of their rights. All their wealth was snatched from them and they were ejected from the home. In some cases they were left with only the clothes they had on their bodies. At times, they were deprived of even this.

Hereunder we will outline some of the customs prevalent in the previous eras. This was taken from the Kitaab *Azwaaj Wa Talaaq,* authored by Allamah Abdullah Al-Maraa`ghee.

NIKAH AND TALAAQ AMONGST THE PERSIANS

The method and mode of Nikah and Talaaq amongst the Persians was totally unlike that of other nations. Besides *ghair-mahrams*, for them it was permissible and acceptable to marry *mahram* relatives as well. They accepted as a norm for a father to marry his daughter, mother her son, brother his sister, etc. They even boasted and flaunted such unions and marriages. They would marry whoever tickled their fancy and they considered not whether the spouse was mature or not. If a woman was barren, then the husband had the choice to immediately break off their marriage. Men had the right of using women in whatever they pleased. He was able to divorce his wife for no reason whatsoever, whenever or wherever he pleased. There was no talk of dowry or maintenance. There was no way or avenue whatsoever for the women to demand or claim any right. [Page 535]

THE CUSTOM OF TALAAQ IN THE FORMER HINDUSTAAN (INDIA)

The custom of the Hindus with regard to Nikah and Talaaq was also unique and very oppressive compared to other nations prevalent at that time. One unmarried and virgin girl would be regarded as being sufficient for an entire family. Every individual in the family was allowed to use that girl in whatever way they pleased. There was another way, where one woman would marry a few men at the same time and she was expected to fulfil every right of every husband without falling short with any one of them.

The condition of one particular group was even more peculiar, in that a woman would marry eleven men at one time. Every one of the men would derive benefit from her at one time. As for the poorer sector of the nation, they would marry only one woman at a time, and this one woman would be sufficient for use by the entire family. This custom was rife in various parts of India.
Insofar as Talaaq was concerned this nation was one step ahead (in inanity). Women also had the right of Talaaq. At one time a woman could marry four mature men and she was given the right to divorce any one at any time she pleased. In the same way men also had the right of Talaaq. A man could divorce a woman whenever he pleased and then he would bring in another wife and benefit from her for a few days and divorce her, and bring in another concubine, and this would continue. In this fashion, when a woman's beauty and youth started waning, then there was no place for her to remain. In this culture there was not even the faintest idea of

safeguarding and preserving a lineage or progeny, because when a woman gave birth then she and the child would be evicted from the home and another wife would be brought in. There was one creed amongst them where the men had the exclusive and absolute right of Talaaq, and he was able to divorce his wife wherever and for whatever reason he desired. [Page 553]

THE METHOD OF TALAAQ OF THE ANCIENT CHINESE

The Chinese women were very obedient and subservient to their husbands. For this reason, without force or coercion many women would enter into marriage with one man. If any woman were to disobey or fall short with fulfilling the duty of her husband then she would be lashed 80 times. Men had the right of using women in any they pleased. For economical and social reasons, a woman would be taken to the marketplace as any other commodity and sold. If after Nikah, a woman disobeys her husband, or indulges in adultery, or is barren, or is afflicted with any illness, or steals anything, or does anything displeasing to the husband, then he had the full right and choice to divorce her. [Page 562]

TALAAQ OF THE ANCIENT GREEK

If a wife indulged in adultery after marriage, then the husband had the full right to evict her from the home. Men also had the right to divorce a woman at any time for whatever reason he deemed fit, and there was no consideration taken of the happiness of the wife. Barren women were looked upon with disdain, and men had the right to separate themselves from such wives. An amusing

facet of their culture was that if the husband was senile, the
n it was the right of the woman that she cohabitate with any man from his family and if she bears a child from this, then the child will be attributed to her husband (and not the man she cohabitated with). Women had no right to annul or invalidate a marriage. [Page 587]

TALAAQ OF THE CHRISTIANS

The method of Nikah of the Christians was also a unique thing. Polygamy was forbidden in their culture. A man could only marry one wife at a time. Once married, a man did not have the right to marry another woman for the rest of his life. There was no such a thing as Talaaq. The couple were doomed to live as husband and wife, if their union was one of disunity, disagreement and disparity. Neither did the husband have the right of divorce nor did the wife have any recourse to separation. [Page 260]

Christians from the Catholic Church also had no recourse for the couple, besides the demise of the one partner.
As far as the Protestants were concerned they had two alternatives for separation between spouses: either one of the passes away or the woman involves herself in adultery. [Page 385]

We will now expound on the system of Talaaq of recent and past nations:

THE METHOD OF TALAAQ OF THE BRITISH

There is no set system of divorce with the British, however in previous times there were some customs

which were prevalent and famous. For example, if any one of the spouses were younger than the age of marriage, as specified by British law, 14 years for a boy and 12 years for a girl, then each one of them had the choice of divorce. If the man was senile or the woman barren, then also, each of them had the choice of divorce. According to their law, insanity or mental instability also warranted separation between the partners. [Page 386]

THE SYSTEM OF DIVORCE IN ITALY

There was no place for divorce in the Italians law. Nevertheless, based on any one of the reasons stated hereunder would constitute a valid basis for any one of the spouses applying to the State for divorce: if any one of them committed adultery, if one of the two of them oppressed the other, perpetrations of acts of bestiality, physical abuse, if any one of the two disgraced or defamed the other or if any one of the two are sent to jail for five years or more. In any of the above cases a separation is decreed by the court between husband and wife. The choice of making the application to court lies in the hands of both spouses. [Page 392]

THE SYSTEM OF DIVORCE IN AMERICA

There are two systems that are rife in America; the one is implemented by the state and the other customary. As far as the law is concerned any one of the spouses may apply to the court for termination of the marriage based on one of the following factors: If any one of the spouses become mentally unstable (insane), if any one of them are terminally ill or sexually inactive, or if the wife becomes impregnated by another man. [Page 410]

REQUEST

This is a brief outline of the systems of divorce, which are prevalent in the various countries and tribes. We note from the above that the (comprehensive) system of Talaaq in Islaam is a blessing and mercy. Where Islaam has stipulated stern conditions for Talaaq, it has also emphasised greatly upon the rights and dues as far as dowry, Iddat, maintenance, etc., are concerned, so that at least the woman does not become dependant upon others during her period of Iddat. Another factor which we note from all the above is that the Islaamic treatment of women with regard to the matter of Talaaq is unparalleled.

WHY MEN HAVE THE RIGHT OF TALAAQ?

Nowadays this is a common question posed by the 'intellectuals' of society. Such questions also arise from the secular state. At the beginning of 1986 an un-Islaamic promulgation by the state has made clear that the state and its justice system do not comprehend Islaamic issues. In a secular set-up, there is no place for Islaamic values. In a secular state such as India, it is not possible to implement religion (in the courts). There is no place or accommodation in Islaam for un-Islaamic laws. The question of Muslim Personal law was raised and one pertinent question was posed with great vigour. It was asked why the woman is deprived from issuing Talaaq? Since this question can be the cause of deviation of may, hence it was deemed appropriate to expound more on this issue based on Qur`aan Majeed and Sunnat.

Allaah Ta`ala has made the man responsible for overseeing the rights of women and to attend to their moral rectification and character. In like manner insofar as the matter of marriage is concerned, Islaam has placed the choice of a delicate and important issue such as Talaaq in the hands of man. It has also placed barriers and limits for its implementation, so that it cannot be abused. However, nowadays the west and all its cronies are at pains to snatch away this right of Talaaq from men and hand it to the state. This has happened in Turkey. This is totally contrary to the Qur`aan Majeed and Sunnat of our beloved Nabi (sallallahu alaihi wasallam). Regardless of who controls the state, even a Muslim government has NO right to overrule the Shariah. It is clearly established from the Qur`aan Majeed and Sunnah that the right of Talaaq is vested in only the husband. The intellect also accepts this decree, as will be explained in the forthcoming discussion.

When the discussion of Talaaq is raised in the Qur`aan Majeed, then this act is attributed to men, which makes abundantly clear that the right to issue Talaaq is vested in the husband only. This is not the right of the state or wife. Allaah Ta`ala says:

"When you issue Talaaq to women…"

"When you have divorced her…"

"When they (men) intend Talaaq…"

In another Aayat, the right of Talaaq is clearly vested in the husband:

"In his hand is the knot of Nikah…"

Hence the choice of untying and opening it (i.e. giving Talaaq) is also in his hands only.

We also clearly note the right of Talaaq being exclusive to men, in the light of the Ahaadith.

We see from the narration of Hadhrat Abdullaah Ibn Abbaas (radhiallahu anhu) that a person came to Nabi (sallallahu alaihi wasallam) and complained that his master had given his slave-girl in Nikah to him and now he (the master) wishes to break off this marriage. Thereafter, Nabi (sallallahu alaihi wasallam) gave a sermon and said the following:
"O people! What is the matter with some of you that you marry your slave to your slave-girl and then you intend breaking off this marriage? Indeed (the right of) Talaaq lies in the hands of the one who holds the thigh (i.e. the husband)."

Besides the Qur`aan Majeed and Hadith, if one analyses the issue of Talaaq, then it will be concluded that by the husband having the exclusive right of issuing Talaaq is in reality a favour and mercy of Allaah Ta`ala upon the fairer sex. Because if this right was also given to women, then Allaah Ta`ala forbid, one would not be able to keep track of how many Talaaqs the wife would have given. The women would then change husbands many times over. The reason for this would be that the fairer sex is also after all deficient on intellect as well. The greatest weakness lies in the fact that the intellect of man is stronger than that of women's. If one also considers the matter well and in depth, then it will be realised that generally women do not have the ability to reflect and consider. They are naturally more impulsive and hasty than men. They are also by far, much more sensitive. Considering this, it would be detrimental to the honour

and respect of women to give them the right and choice of Talaaq.

Looking at it from another perspective, is that since man is responsible for the maintenance and upkeep of the wife, then it is only natural that he, and not anybody else, should have the right of keeping control her rights and have the choice thereof. Otherwise it would like one person purchasing a commodity, and the right to use it lies in the hands of others. This is contrary to the intellect and logic.

A third point is this that the opposite party who wishes to have 'free' (gratis) control and choice (in a marriage), be it the wife or the courts, then it would be like one acquiring wealth for free, hence there will be laxity and carelessness in using it. If one is given the free and unfettered use of something, then it is a forgone conclusion and there is no possibility that the recipient will have any consideration for the rightful owner. Therefore, for the husband to be invested with the right of Talaaq is not merely a means of safeguarding and protecting a marriage, in fact, in it lies the wisdom of circumventing the harm of excessive divorces taking place.

THE TYPES OF TALAAQ

After expounding on the Islaamic perspective regarding Talaaq, the question now arises as to how Talaaq be implemented. What type of Talaaq is acceptable in Islaam and what type is looked upon with disdain.

There are three types of Talaaq which are recognised in Islaam. The status of each one of them is different; *(1) Ahsan, (2) Hasan and (3) Bid`at.*

Talaaq-e-Ahsan is that Talaaq where the man divorces his wife with one Talaaq in such a *Tuhur* (Paak period), wherein there was no cohabitation. He leaves her in this state until she completes her Iddat, whereafter she comes out of the bond of Nikah, and is now free to marry another man.

The famous Faqeeh, Allamah Alaa`uddeen Al-Kaasaani Hanafi (rahmatullahi alaihi), in explaining Talaaq-e-Ahsan, writes in *Badaa`i Wa Sanaa`i:*
"Talaaq-e-Ahsan is such a Talaaq, where the husband gives his wife, who is one that still menstruates, one Talaaq-e-Raj`i in such a Paak period, wherein he had not had intercourse with her. He leaves her (in this condition) until she completes three Haidh periods, thus completing her Iddat." [Page 1765]

If the woman's pregnancy becomes apparent, and the opportunity for Talaaq arises, then in such a case also, Talaaq-e-Ahsan is the best option. The author of *Badaa`i* writes:

"And however, as far as a pregnant woman is concerned, where her pregnancy is apparent (known), the best is that he gives her one Talaaq-e-Raj`i." [Page 1766]

As far as issuing Talaaq to that woman who has passed her menopause or the immature girl, the author of *Badaa`i* states the following method:
"Similarly, as far as that woman who has passed the age of menopause or the immature girl, the Ahsan is that he gives her one Talaaq-e-Raj`i."

According to the Shariah, Talaaq-e-Ahsan is the best method of Talaaq and also logically and rationally, as well, this is the most beneficial. There are many benefits and wisdoms in this type of Talaaq. Firstly, if ever the opportunity of Talaaq arises, then after issuing the Talaaq, then man almost always regrets. As it usually occurs nowadays, divorce is given at the drop of a hat and in anger, whereafter there is always regret and shame. Apparently, the biggest reason (for this type of Talaaq) is that according to the Shariah, it is a means of escaping from the (permanent) Talaaq.

If one has to give a Talaaq, then what is there to stop a person from giving a Talaaq in the manner specified by the Shariah? One should give one Talaaq-e-Raj`i so that afterwards one will not have to be regretful or ashamed at the action. The author of *Bahrur Raa`iq* has gone as far as to say that if the desire or motive for issuing Talaaq arises and one restrains oneself from issuing a Talaaq contrary to the Shariah, then such a person will be rewarded. [Page 238, vol.3]

ONE MORE REASON FOR ITS VIRTUE

Talaaq-e-Ahsan is regarded as the best form of issuing Talaaq, because if the couple happen to reconcile during the Iddat period, then they may reunite without having to perform a new Nikah. If they reconcile after the Iddat is over, then too they may reunite with just renewing the Nikah, and there will be no need for making *Halaalah (where the wife has to first marry someone else and consummate the marriage, whereafter that husband has to divorce her and then only after the Iddat will she be able to re-marry the first husband).* This is precisely the reason why one should never issue three Talaaqs. Therefore, one should reflect well and consider, if ever, Allaah Ta`ala forbid, an opportunity arises for Talaaq; one should ***never*** verbally or in writing give more than one Talaaq. The reason is because: ***The effect of three (Talaaqs) is also achieved by the one.***

The author of *Bahrur Raa`iq* sheds more light on the subject by stating:

"The first is specified with the term 'Ahsan', as reported by Ebrahim An-Nakha`ee, that the Companions of Rasulullah (sallallahu alaihi wasallam) used to prefer not adding to the one Talaaq during the Iddat. And this was most preferred by them." [Page 238, vol. 3]

He further states, citing from *Mi`raaj:*

"It is stated in Mi`raaj that this type is preferred (Ahsan) over the second type because there is unanimity in it. Contrary to the second type, wherein there is difference of

opinion, since Imaam Maalik (rahmatullahi alaihi) regards it as being Makrooh." [Page 238, vol. 3]

From the above discussion it has been established that to issue Talaaq-e- Ahsan is the best form of Talaaq. That is, to give the wife one Talaaq-e- Raj`i and to leave her until the completion of her Iddat.

TALAAQ-E-HASAN

This is the second type of Talaaq, which is one stage below Talaaq-e-Ahsan. The author of *Badaa`i* states, in explaining Talaaq-e-Hasan:

"However, Hasan (Talaaq) with regard to that free woman who still menstruates, is that she be given three Talaaqs, in three different Paak periods, wherein there is no intercourse. This is done by giving her one Talaaq in a Paak period wherein there is no intercourse, then (again another one) when she attains purity after menstruating (and a third Talaaq in the third Paak period after the second menstruation). This is the view of the general Ulama. Imaam Maalik (rahmatullahi alaihi) says: 'I do not recognise Talaaq-e-Sunnat except that the man issues one Talaaq and he leaves the wife until she completes her Iddat.'" [Page 1767, vol.4]

If for some reason the man wishes to give his wife three Talaaqs, and he is not satisfied with just one, as explained in Talaaq-e-Ahsan, then he should give her the three Talaaqs in three different Paak periods. However, this method is not preferred. It is for this reason that Imaam Maalik has recognised as Sunnat and consented to only the first type of Talaaq. Logically and rationally, also, the

intellect dictates that if a man wishes to divorce his wife, then he should suffice on one only. There is no reason to increase on this since the effect will be the same (i.e. the bond of Nikah will be severed). But alas! The situation nowadays is so sad and tragic, that, leave alone three Talaaqs in three different Paak periods, three Talaaqs are given at one go, whenever the fancy and whim dictates. Consideration is not even given to whether the wife is Paak or menstruating. Three Talaaqs are issued in one voice and word. The harms and devastating effects of this are further expounded upon in the discussion regarding three Talaaqs.

According to Imaam Maalik (rahmatullahi alaihi) Talaaq-e-Hasan is abominable and contrary to the Sunnat. In this regard, the author of *Badaa'i* states;
"*The reason for his (Imaam Maalik's) stating that the Sunnat Talaaq is that Talaaq which is issued at the time of need and the need is satisfied and fulfilled with one Talaaq. The second and third (Talaaqs) in the subsequent Paak periods are unnecessary, hence he regards them as Makrooh.*" [Page 1767, vol. 4]

TALAAQ-E-BID'AT

The third type of Talaaq is Talaaq-e-Bid'at, which is abhorred and detested by the Shariah. The person who perpetrates such a Talaaq is regarded as a sinner. The reason for this is that although the Talaaq is effected in a manner which is contrary to the Shariah, it will still be effective but it will result in the woman being placed in unnecessary hardship and difficulty, and according to the Shariah this (difficulty upon the woman) is unacceptable and detested.

TALAAQ IN THE STATE OF HAIDH

One of the types of Talaaq-e-Bid`at is to issue Talaaq whilst the wife in the state of Haidh. This is totally contrary to the Qur`aan Majeed and the Sunnat. One of the reasons for the abhorrence of Talaaq-e-Bid`at is that it causes an unnecessary elongation of the Iddat period, which is naturally a means of difficulty upon the woman. It is stated in *Badaa`i:*

"It is reported from Rasulullah (sallallahu alaihi wasallam) that he said to Abdullah bin Umar when he (Abdullah bin Umar - radhiallahu anhu) divorced his wife in the state of Haidh: 'You have acted contrary to the Sunnah, in this is an elongation of the Iddat for her, and this is harmful for her.'" [Page 1778, vol.4]

Nabi (sallallahu alaihi wasallam) reprimanded Hadhrat Ibn Umar (radhiallahu anhu) on that occasion and ordered him to make *Rujoo`* (take her back). On that occasion, Nabi (sallallahu alaihi wasallam) said: *"Instruct him to take her back and keep her until she attains purity."* [Page 790 – Bukhari Shareef]

The author of* Badaa`i *states:

"If he (the husband) divorces his wife in the state of Haidh, then it is best that he makes Rujoo`." This is clearly explained in *Durrul Mukhtaar*:
"It is Waajib to make Rujoo` (of the wife if she is divorced whilst in the state of Haidh) according to the authentic view, so that one may be saved from sin. Once she attains purity, then divorce her if you wish or keep her." [Shaami, page 577]

THE SECOND TYPE OF TALAAQ-E-BID`AT

Another types of Talaaq-e-Bid`at is when the husband gives his wife a Talaaq in such a Paak period wherein he had intercourse with her. The reason for this is given as the possibility of the wife conceiving from that intercourse and her Iddat will be unnecessarily elongated due to that pregnancy and it will be a calamity rather than any ease. The author of *Badaa`i* states;

"There is a possibility that she conceives owing to that intercourse and at the confirmation of the pregnancy he will be regretful." [Page 1778, vol. 4]

THE THIRD TYPE OF TALAAQ-E-BID`AT

The third type of Talaaq-e-Bid`at is that the husband issues two or three Talaaqs during one Paak period. Regardless of whether he does this in one sentence or separately, in one gathering or at various times. Nevertheless, the Talaaq will be effective, but it is contrary to the Qur`aan Majeed and Sunnat. In fact, it is Haraam. This is explained thus in Shaami:

"Bid`at stems from 'Al-Bid`ah' (innovation). Its implication here is that it is Haraam, due to the perpetration of a sin." [Page 576, vol. 2]

Although all the above-mentioned types of Talaaq are prohibited and abominable in the Shariah, nevertheless, their issuance will be effective and Talaaq will fall. Besides this, if three Talaaqs are given, then without having made *Halaalah*, it would be Haraam to still live together and to indulge in intercourse would be adultery.

The details regarding *Halaalah* will, Insha-Allaah Ta`aia be discussed later.

THE RULING OF TALAAQ-E-BID`AT

As was mentioned earlier, to issue three Talaaqs at once in one gathering would be effective and three Talaaqs will fall. Any other ruling besides this would be improper and there is no scope for any interpretation to waylay this issue. To discuss it away, thereby disregarding the consensus of the Ummat is indeed a silly move. There is unanimity on this subject, hence in this regard, the author of Shaami states:

"Majority of the Sahaabah, Tabieen and latter Ulama have opted that indeed three Talaaqs are effected (if given in one sitting)." [Page 576, vol. 2]

*"Nevertheless, as for Talaaq-e-Bid`at, its issuance is indeed effectual and three Talaaqs fall. This is the ruling of the majority of the Ulama. Some opt that it is ineffective, and this is also the view of the Shiahs."* [Badaa`i, page 1783, vol. 4]

INTERCOURSE IS A CONDITION IN HALAALAH

If a couple intend reconciling after three Talaaqs have been issued, then it is necessary that *Halaalah* first take place. *Halaalah* is that after a woman is given three Talaaqs, she has to complete her Iddat, whereafter she has to marry someone else and she has to cohabit with him at least once. Now, when this second husband gives her Talaaq, and after she completes this Iddat, she may re-marry her first husband. The object in *Halaalah* is that there has to be cohabitation in this second marriage. This is a necessary condition for the validity of *Halaalah* and mere Nikah is not sufficient. The author of *Badaa`i* has expounded sufficiently on this matter and we will cite a brief excerpt from his research into the matter and state the *Muftaa Behe Qowl (accepted ruling).* He writes:

"(And amongst the conditions of Halaalah) is intercourse with the second husband. Nikah with the first husband is not permissible unless he (the second husband) penetrates her. This is the view of most of the Ulama." [Page 1990, vol. 4]

Allamah Shaami (rahmatullahi alaihi) writes: *"Halaalah is dependent upon intercourse, and not mere Nikah."* He writes further that the Shariah is stern on the matter of confirming the *Halaalah* (with intercourse).

It has also been said that this has been made a condition in order to teach a lesson to the errant husband who caused the problem due to his anger. His one distasteful act (of giving three Talaaqs in anger) has now led to an even more distasteful and unpleasant event (that his wife

has to be 'penetrated' by another man). This is one of the main reasons why intercourse has been made a condition. Intercourse between the wife and (second) husband also has to be a full intercourse where there is full and proper penetration (at least the head of the male organ should enter the vagina), whereafter Ghusal becomes incumbent on both of them. This has been dilated in *Aalimgiri* as follows:

"It is amongst the conditions (for Halaalah) that there has to be such (full) penetration which necessitates Ghusal. There has to be a meeting of the private parts." [Page 651, vol. 2]

From the above explanations it is evident that mere Nikah is insufficient to effect a *Halaalah*, there has to be full and proper penetration. The final and authoritative ruling is on this. However, the view of Hadhrat Sa`eed Ibn Musayyib (radhiallahu anhu) differs from that of the rest, in that he regards mere Nikah as being sufficient. The author of *Badaa`i* states:

"Sa`eed Ibn Musayyib says that Halaalah is effected by mere Nikah. His proof is in the Aayat of the Qur`aan Majeed: ***'When he gives her Talaaq then it is not Halaal for him thereafter (to marry her) until she makes Nikah with another husband.'"*** And according to him Nikah here refers to the contract of marriage.

Our proof (for stating that intercourse is a condition) also lies in the word ***"Tankihu"***. We say that this word means 'intercourse'. This is in reality the meaning and import of the word *Nikah*. The author of *Badaa`i* states:

"And according to us, the Words of Allaah Ta`ala: ***'When he gives her Talaaq then it is not Halaal for him thereafter (to marry her) until she makes Nikah with another husband.'*** *The meaning of the word An-Nikah is intercourse, because the lexicographic meaning of the word is actual fusion and actual fusion is intercourse."* He states further that even if we assume that the Aayat refers to the mere contract of marriage, then too we state that the condition of intercourse is necessary for *Halaalah*, since there are sufficient authentic Ahaadith to confirm this view. [Page 1991, vol. 9]

IS EJACUALATION ALSO A CONDITION?

There remains one question with regard to consummation of the second Nikah being a condition for *Halaalah*, and that is -- Is ejaculation also necessary or is mere penetration sufficient? In this regard the famous Fatwa Kitaab, *Fataawa Aalimgiri* explains as follows:

"However, ejaculation is not a condition for Halaalah." [Page 651, vol.2]

The author of *Durrul Mukhtaar* also explains as follows:

"Even if there is no ejaculation because the object is pleasure and not saturation. It is reported in 'Mujtaba' that the mere penetration is sufficient for the validity of Halaalah." [Page 793, vol.2]

Allamah Ibn Aabideen writes the following noteworthy points: *"Contrary to that man who has no erection, but there is the joining of the private parts and penetration is effected, then for her Halaalah is done by it."*

MATURITY IS ALSO NOT A CONDITION

Now the question will arise that since ejaculation is not a condition, then *Halaalah* can be effected by a child also. The Ulama have clearly explained that if the child is a *Muraa`iq* (close to maturity), where he is able to have intercourse, then after a union with such a boy, too, *Halaalah* will be effected and the woman may return to the first husband. Similarly, *Halaalah* will also be effected after a union with an insane person. However, how does one ascertain whether the boy is close to maturity or is consideration taken of his age?
In this regard the author of *Badaa`i* states:

"It is irrelevant whether the second husband is mature or a child who can have intercourse, and he has intercourse with her. Or he is insane and he has intercourse with her. Accordingly the Words of Allaah Ta`ala: 'Until another husband makes Nikah with her', makes no distinction between types of husbands. Indeed the laws of Nikah apply to a child and insane person insofar as dowry etc. are concerned." [Page 1992, vol.4]

This is also explained in *Fataawa Aalimgiri*:

"A boy close to maturity has the same effect as a mature man with regard to Halaalah. The definition of a Muraa`iq is given in Jami`us Sagheer as follows: 'A boy who has not yet matured (no sperms have emanated from him yet), but he knows how to execute intercourse, if he has intercourse with his wife, then a Ghusal will become binding upon the woman and she becomes Halaal for her first husband. The object here is that he does get an

erection and also has the urge to have intercourse." [Page 651, vol.2]

Moulana Abdul Hayy (rahmatullahi alaihi) states that the age of a boy close to maturity should be taken into consideration. He writes, quoting from *Fawaahid Shamsul Islaam*:

"It is stated in Fawaahid Shamsul Islaam that his (the second husband's) age should at least be ten years." [Majmoo`a, Page 120, vol.2]

Together with this it should be understood that if an old man, who due to erection problems and lack of sexual desire, does have an erection at the time of meeting of the organs, then too the *Halaalah* is effected. However, if his erection does not last even after penetration, then *Halaalah* is not effected. It is stated in *Aalimgiri*:

"If a very old man who has no sexual desire is made to penetrate by use of the hand, then she (the wife) is not Halaal for the first husband, except if he (this old man – second husband) has an erection and carries out full intercourse." [Page 651, vol.2]

However, Allamah Shaami has stated that the mere disappearance of an old man's penis (into the vagina) – regardless of whether done by natural erection or by hand - is sufficient for *Halaalah*. He has written this view as being the authentic and correct one: *"The correct view is that she becomes Halaal, because it involves the entrance of the penis."* [Page 743, vol. 2]

Similarly, if the male organ become flaccid after entrance or he is suffering from such a malady where he has no erection, but there is meeting of the private parts, then *Halaalah* is effected. The author of *Bahrur Raa`iq* states: *"Contrary to that man who has no erection, but his organ is made to penetrate (his wife's), such there is a meeting of the private parts, then Halaalah is effected."* [Page 56, vol.4]

TO MAKE HALAALAH BY USE OF A CLOTH

Another way of effecting *Halaalah* is if there is penetration with an intervening cloth over the male organ. If there is joining of the private parts, then *Halaalah* will be effected, on condition that body heat and pleasure are experienced. The crux of this *mas`alah* as dilated by the Fuqahaa-e-Kiraam (rahmatullahi alaihim) is that as long as there is a meeting of the male and female private parts and body heat is felt, then *Halaalah* is effected, otherwise not. It is stated in *Bahrur Raa`iq:*

"By intercourse is meant that there must be penetration, on the condition that it (penetration) is effected by its (the male organ's) own ability even though it may be covered in a cloth, as long as pleasure is experienced and heat of the organs is felt." [Page 56, vol. 4]

It is stated in *Aalimgiri* as follows:
"If the male organ is covered in a cloth and it enters the vagina, Halaalah will be effected if the heat (of the organs) is felt, otherwise not." [Page 651, vol. 2]

HALAALAH WITH A CONDOM

One also hears questions regarding the use of a condom with regard to its being effective in achieving *Halaalah*. It is used either to prevent ejaculation or to lessen the disgrace of having to make *Halaalah*. Its ruling will be the same as that of a cloth. In fact, the use of a condom allows one to better experience and enjoy intercourse instead of a cloth. Everything is experienced. There is no harm in doing this since it is stated in the Hadith: *"Until she experiences his sweetness and he 'tastes' hers."*

HALAALAH FOR A YOUNG IMMATURE GIRL

If a man gave his young and immature wife, who is not capable of intercourse three Talaaqs, then too *Halaalah* will be necessary for her in order for her to be able to return to the first husband. However, a condition here is that the husband must have given his wife three Talaaqs simultaneously or in one sentence, for example he says: "I have given you three Talaaqs", or he says: "Three Talaaqs for you." In this way three Talaaqs are effective. If he gives her three Talaaqs separately, like he says: You have one Talaaqs, two Talaaqs, three Talaaqs", then in such a case *Halaalah* is not necessary. In fact they may renew their Nikah without any *Halaalah*, because in this case, the wife becomes *Baa`inah* from her husband with one Talaaq.

The procedure for *Halaalah* for a young immature girl is that she waits for as long as she is able to have intercourse, so that she may marry a second husband and *Halaalah* can be effected. In this way the path is now open for her to return to the first husband (i.e. after the

second one divorces her). This is stated in *Durrul Mukhtaar.*

However, there is no Iddat for a woman with whom intercourse was not made or for that young girl who is still unable to have intercourse. The details on this will follow in the chapter regarding Iddat.

DEATH IS NOT IN THE STEAD OF INTERCOURSE

A woman marries a second husband with the intention of *Halaalah*, but before they can cohabit, the husband passes away. Will this death of the second husband now make this woman Halaal for the first husband or not? With regard to this, there is unanimity amongst the Fuqahaa, that this woman is not Halaal for the first husband and she will have to marry a third time and only after effecting cohabitation with this husband will she be able to go back to the first husband. The reason being that only marriage was effected with the second husband and there was no intercourse. The author of *Bahrur Raa`iq* writes: *"Death does not take the stead of penetration insofar as Halaalah is concerned."* [Page 56, vol.4]

The author of *Raddul Mukhtaar* states the following: *"If he (the second husband) dies before effecting intercourse, she does not become Halaal for the first (husband)."* [Page 742, vol.2]

However, if the second husband did have intercourse with the wife and thereafter he passes away, then she will become Halaal for the first husband. It is stated in *Fataawa Hindiya: "She does not become Halaal for him (the first husband) until she enters into a proper Nikah*

with another husband and he penetrates her (has intercourse), and then he (this second husband) divorces her or passes away." [Page 651, vol.2]

MAKING NIKAH WITH THE INTENTION OF HALAALAH

Sometimes it happens that there is no certainty that the second husband will give Talaaq, however, this is rare. In fact, when a person is prepared to effect *Halaalah*, then at least in his heart he has this intention that he will give her Talaaq after completing his 'job' at night. There are two possibilities here; the one is that before the Nikah an agreement is reached that immediately after the Nikah the Talaaq will be given. This is the common practice. Alternatively, the husband and wife make a verbal agreement that after the Nikah, the first priority is Talaaq, or it is obvious or taken for granted that the (second) husband will give Talaaq after the Nikah, however, there is no verbal agreement of this.

Regarding the first option, there is a difference of opinion amongst the Fuqahaa. The author of *Badaa`i Wa Sanaa`i* states as follows: *"If Halaalah is made a verbal condition, that he (second husband) is marrying her for that reason, and she makes the condition, then the Nikah is effected according to Imaam Abu Hanifah and Zufar (rahmatullahi alaihima), and she is Halaal for the first husband, however, this act is Makrooh for the second husband.*
Imaam Abu Yusuf (rahmatullahi alaihi) says that this second Nikah is Faasid (invalid), and even if he (second husband) has intercourse with her, she does not become Halaal for the first (husband). Muhammad (rahmatullahi

alaihi) says that this second Nikah is valid, but she does not become Halaal for the first (husband)." [Page 1989, vol.4]

The proof of Imaam Abu Yusuf (rahmatullahi alaihi) is that this Nikah is temporary. In this regard, Allamah Shaami (rahmatullahi alaihi) writes: *"It is reported from Abu Yusuf that the Nikah is invalid, since it is temporary."*

Thereafter, he writes the proof of Imaam Muhammad (rahmatullahi alaihi): *"It is reported from Imaam Muhammad (rahmatullahi alaihi) that the Nikah is valid, but she does not become Halaal (for the first husband), because she has hastened a matter wherein the Shariah has granted respite."*

However, the Fatwa is on the view of Imaam Sahib (rahmatullahi alaihi), and the text of *Durrul Mukhtaar* indicates towards this: *"She becomes Halaal for the first (husband) owing to the validity of the Nikah, and the condition is rejected."*

Allamah Shaami (rahmatullahi alaihi) has opted for the view of Imaam A`zam (Abu Hanifah - rahmatullahi alaihi) and the author of *Bahrur Raa`iq* has also made sufficient comment in this regard. He reports from Imaam Ibn Humaam Al-Hanafi (rahmatullahi alaihi): *"Yes, the condition is Makrooh, as has been mentioned regarding nonsensical talk, but everything besides this remains. And that is, the intention of making Halaalah without any Karaahat."*

However to do this is Makrooh-e-Tahrimi, as has been stated in *Bahrur Raa`iq*: *"That is, it is Makrooh to marry a second husband with the condition that it is for*

Halaalah for the first husband. If he (second husband) says: 'I am making Nikah with you on this condition that I am making Halaalah, or if the woman says something similar...By saying there is Karaahat is meant Tahreem (Haraam) which warrants punishment." [Page 58, vol.4]

INTENTION OF HALAALAH IS PERMISSIBLE WITHOUT KARAAHAT

However, the second method, where there is only the intention of *Halaalah* and no verbal intention or such agreement, then according to the majority Fuqahaa, this is correct and permissible. The reason being that a mere intention in matters of mutual dealings is of no consequence and the wife will become Halaal for her first husband without any objections. In fact, the author of *Bahrur Raa`iq* has stated this to be a rewarding act, in the Sight of Allaah Ta`ala: *"However if the two of them had intended, then it is worthy of reward, because mere intention in matters of mutual dealings are of no consequence."*

The author of *Badaa`i* states that there is unanimity on this: *"If the two of them do not make it a verbal condition, and they merely intend it, and he penetrates her upon this intention, then she becomes Halaal for the first husband, according to the view of all (Fuqahaa)."*[Page 1989,vol. 4]

TO CHANGE ONE'S MASLAK (MATH-HAB) IS HARAAM

Upon terminating the subject of *Halaalah,* we would hasten to add that there is a certain practice amongst some which is close to kufr. Such vile acts have become like a plaything for some. With regard to *Halaalah* we have outlined its details in the preceding pages and stated the various proofs, which constrains us to accept that the Islamic system of *Halaalah* forms an important part in the smooth sailing of the social and moral stratum. In complying with this people are saved from evils such as adultery, immorality, etc. This is not merely my own opinion, in fact, it is a natural conclusion which one draws from the written and logical proofs cited in this regard. Islaam has prescribed the system of *Halaalah* in order to safeguard the honour, chastity and respect of the believers. However, there are some miscreants who regard *Halaalah* as an insignificant thing.

Everyone knows the system of politics of any government, and they know well what the procedure and censures are for indiscriminate changing of parties and allegiances. There are rules and regulations set out for this. When this is the case for man-made systems, then all the more delicate and sensitive is the case of the Shariah. There are many persons who, in following their base desires, resorted to changing their Math-habs. Their hearts have become desensitised and hard and think nothing of changing their Math-hab in order to satisfy their base desires. They strive to change the Shar`i rulings to suit them by changing their Math-hab. Such gross acts are undoubtedly Haraam.

To change one's Math-hab is in actual fact a dishonour, which is being lauded onto the Shariah. Every math-hab, be it that of Imaam Abu Hanifah (rahmatullahi alaihi) or Imaam Shaafi (rahmatullahi alaihi), they are all in conformity of the Qur`aan Majeed and Sunnat. Where the differences come in amongst the different Mathaahib, that is where the test comes for the believers. It will be seen that just in order to satisfy one's desires and bear a little difficulty, people are prepare to change their Math-hab! What credibility and value can be placed on the Imaan and allegiance of such people to Islaam?

In this regard we make an appeal to those who are involved in this vice, to immediately desist therefrom and take stock of their Imaani condition. They should keep the teachings of their respective Mathaahib intact and in practice. In this lies salvation in this world and Aakhirah. The Fuqahaa have stated that there is a fear of such people (who change their Math-hab at the turn of a hat) dying without Imaan.

The crux and basis of every person's life is his final state. It has been stated in the Hadith, *"Indeed a person's actions are his final end...."* It is even a sin for a Mujtahid to change from one Math-hab to another. It is stated in *Sharh-e-Hamwe*, *"To change from one Math-hab to another, with Ijtihaad and proofs, is a sin. (Such an action) is liable for punishment. So, all the more (is it a sin) to change without Ijtihaad or proofs."* [Page 256]

It is understood from the famous and reliable Fatwa Kitaab, *Qunya*, that to change Math-hab (for no reason) is an act wherein there is a fear of one's Imaan being lost.

"It is not appropriate for a layman (unlearned person) to change from one Math-hab to another. This is equal for Hanafi and Shaafi. It has been said that the person who changes to the Shaafi Math-hab (or the other way around) for the sake of marriage, there is a fear of his losing his Imaan, because he has reviled the Deen in exchange for carrion (a worldly reason)." [Page 155]

The impermissibility of changing Math-habs has also been stated in *Durrul Mukhtaar*,
"After making Taqleed (of one Imaam), to change therefrom, is spurious. There is consensus upon this. This is also the preferred ruling." [Page 51, vol.1]

As stated above this ruling is unanimous amongst ***ALL*** Ulama and Fuqahaa. Allamah Shaami (rahmatullahi alaihi) states from Allamah Joz-Jaani (rahmatullahi alaihi), *"As Joz-Jaani has stated regarding that man who abandons the Math-hab of Imaam Abu Hanifah (rahmatullahi alaihi), in order to marry a woman of the Ahle Hadith, he (Joz-Jaani) states, 'I fear that such a person's Imaan will be snatched away from him, because he has reviled and dishonoured that Math-hab which he believed to be Haqq in exchange for something which is foul and carrion."* [Page 307, vol. 3]

After perusing the above discussion, those who intend changing Math-habs must reflect and ponder carefully. May Allaah Ta`ala save us from such actions and always keep our Imaan intact.

ISOLATION OF THE SPOUSES DOES NOT CONSTITUTE A VALID BASIS FOR HALAALAH

If there is an isolation of the spouses, then in the Masàlah of Halaalah, it does not take the place of intercourse. It is recorded in the famous Fatwa Kitaab *'Qainiyah'*,

"Similarly, in the case of halaalah, isolation (of the spouses) dos not constitute a valid substitute for intercourse." [Page 83]

HALAALAH IS NOT EFFECTED BY PENETRATION IN THE ANUS

If a man, enters the anus of a woman (which is *haraam*), instead of her vagina, then this does not effect *halaalah*. The reason for this is that firstly, such an act is *haraam* and sinful, and secondly, since the penetration was done in another place other than the normal place for intercourse, *halaalah* is not effected. This *masàlah* is also outlined in *Qainiya*, as follows, *"If he (the second husband), penetrates her from the anus, then she is not halaal for the first (husband)."*

IF A WOMAN SAYS THAT SHE HAS ALREADY MADE HALAALAH

If a woman says to her husband that she had already made *halaalah* and that he may marry her again, then in such a case, it is not permissible for him to just marry her again without making a thorough investigation into the *halaalah*. He should enquire as to every detail of the *halaalah*, and then only after he had thoroughly

investigated the matter should he prepare for Nikah with her. If he does not do this then there is a fear that if the *halaalah* was never properly effected then she will remain *haraam* for him until she had properly made *halaalah.* They will then be guilty of living an adulterous relationship. The major sin in this case will fall upon the husband, since he had not properly ascertained the details of the *halaalah*. The following is stated in *Qainiya*, *"If she says, 'I am halaal for you', or she says, 'I have made halaalah', then she does not become halaal for the (first) husband, until he had properly investigated the matter, due to the difference of opinions amongst the people regarding the method of halaalah. This is the correct view."* [Page 84]

ANOTHER METHOD OF TALAAQ-E-SUNNAT

In the preceding pages we had listed the different types of Talaaq and during this discussion the issue of *halaalah* was also included. We also understand that if ever the necessity for Talaaq arises, then to adopt the Sunnat method warrants Thawaab (reward) for one. Now, the abovementioned ways of effecting Talaaq-e-Sunnat, assumed that the husband and wife were residing in the same home. There may be cases where the husband may be in one country and the wife in another. If an occasion arises for such a couple to divorce, then there should be a way where it can effected and also be worthy of reward.

With regard to this the Fuqahaa have written that the husband write a letter to his wife and in that letter he states his Talaaq in the way outlined by Allamah Alaaùddin in *Badaaì Wa Sanaai*, *"If the husband is absent and he desires to divorce his wife, with one*

Talaaq, according to the Sunnat, then he should write to her, 'After this letter reaches you, and you menstruate, you have one Talaaq, as soon as you attain purity."

This will be so if one Talaaq is intended. If he desires, to give his wife three Talaaqs, and at the same time doing it according to the Sunnat, then the Fuqahaa have considered this also. It is written, *"If he desires to give her three Talaaqs, then he should write to her thus, 'After this letter reaches you and you menstruate, you have one Talaaq upon attaining purity, and then after you menstruate the second time, you have a Talaaq upon attaining purity, and after menstruating for the third time, you have one Talaaq upon attaining purity.'"* [Page 1777, vol. 4]

THE DISCUSSION ON TALAAQ-E-SAREEH A few important factors

Before we begin the discussion on Talaaq-e-Sareeh, it is important that we firstly dilate on a few points, which would facilitate an easy understanding of the *masaail* that will follow.

INTENTION IS NOT IMPORTANT

The first and foremost point that we would like to make is that the intention is not important for Talaaq-e-Sareeh to take effect. In fact, intention is not even considered in matters of Talaaq-e-Sareeh. A ruling for the effectiveness of Talaaq is dependant on the words spoken and its implications in usual dialogue. The Author of *Bahrur Raaìq*, has outlined Talaaq-e-Sareeh as follows, "*Talaaq-e-Sareeh is not dependant upon intention.*" [Page 257, vol. 3]

THE STATEMENT OF THE AUTHOR OF BADAAÌ

The author of *Badaaì* states clearly that intention plays no part in Talaaq-e-Sareeh,

"*The import of these words are clear in that they are not used except for Talaaq from the bond of Nikah. There is no need in this for intention, for the effectiveness of Talaaq.*" [Page 1794, vol. 4]

He has further expounded on this with interesting proof, "*Since intention is effective and necessary for specifying an unclear thing, and there is nothing unclear here. Allaah Ta`ala says, 'Give them Talaaq for their iddat', here Talaaq is mentioned without any condition of*

intention. Allaah Ta`ala says, 'The Talaaq is twice', here also the statement is general (i.e. no condition of intention is mentioned). Allaah Ta`ala says, 'Thus when he gives her (three) Talaaq, she is not halaal for him, thereafter, until she makes Nikah with another man. Here also, Allaah speaks of the breaking of the Nikah, without specifying a condition of intention." [Page 1794, vol. 4]

Stating proof from the Ahaadith for the non-consideration of intention, he states,

"Abdullaah Ibn Umar (radhiallahu anhu) reports that when he divorced his wife in the state of Haidh, Nabi (sallallahu alayhi wasallam) ordered him to take her back. He did not ask him whether he intended Talaaq or not. Had intention been a condition, then Nabi (sallallahu alayhi wasallam) would most certainly have asked him." [Page 1794, vol. 4]

From foregoing, it is clearly established that intention is of no consideration in matters of Talaaq-e-Sareeh. The second thing is that, one Talaaq-e-Raj`i takes effect when the words of Talaaq-e-Sareeh are uttered (that is if the words are stated once, if it is uttered twice or thrice, then proportionate Talaaq will fall). For example, if a man tells his wife, *"You are divorced"*, then with such clear words, one Talaaq-e-Raj`i will take effect. It is stated in *Fataawa-e-Hindiyah, "(if the husband says) 'You are divorced' or 'I give you one Talaaq', then one Talaaq-e-Raj`i takes effect."* [Page 500, vol.2]

The author of *Bahrur Raaìq* has also explained it explicitly. Allamah Shaami (rahmatullahi alaihi) states, *"Indeed Sareeh is not dependant upon intention..."* He

states further, *"Because by it (his words) he infers one Talaaq-e-Raj`i, even though he intends differently."* [Raddul Mukhtaar, Page 591, vol. 2]

Thirdly, in Talaaq-e-Raj`i, the husband may takes his wife back during her *iddat* without renewing the Nikah. This is what is called *Ruj`at*, in Fiqhi terminology. A detail explanation on this will come in the relevant section, Insha-Allaah. However, after the *iddat* passes, (and if the husband did not take her back), then she becomes *baa`inah*, and she is freed from the bond of Nikah. Now, if the husband desires to reconcile, then a new Nikah is necessary. Allamah Ibn Aabideen has written, *"Because indeed, (Talaaq-e-) Raj`i does not sever the bond of Nikah, that is, before the termination of the iddat."* [Shaami, Page 219, vol. 2]

This much has been made clear that after the termination of the *iddat*, the bond of Nikah no longer exists.
The fourth thing is that after Talaaq-e-Raj`i, the woman still remains bonded in the Nikah, until she passes three Haidh periods. After Talaaq-e-Raj`i, since the bond of Nikah still remains, the husband may exercise the rights due to him, but upon termination of the *iddat*, if there is no renewal of Nikah, then he enjoys no right over her. Allamah Shaami (rahmatullahi alaihi) states, *"This is clear, that in (Talaaq-e-) Raj`i the Nikah is still existent, in every respect...because since his rights still remain, the Nikah is still regarded as being effective."* [Page 646, vol. 2]

THERE ARE TWO TYPES OF SAREEH

There are two types of Talaaq-e-Sareeh; the one is that of *Raj`iyat*, where the husband has the choice of taking his wife back during the *iddat* period, and the second type is *Baa`inah*, where the wife immediately is taken out of the bond of Nikah. In this second type, the husband has no choice of taking the wife back, except with renewal of Nikah. Allamah Shaami (rahmatullahi alaihi) states, quoting from *Badaa`i, "It is stated in Badaa`i, that indeed Sareeh is of two types, Sareeh-e-Raj`i and Sareeh-e-Baa`in."* [Shaami, page, 592, vol. 2]

SAREEH-E-RAJ`I

The author of Bahrur Raa`iq, states, explaining Sareeh Raj`i, *"Sareeh Raj`i is that Talaaq which is given after a penetration, three is not given, it is not done indirectly, it is not given with such description which indicates Baa`inah or it does not have any conjunctive word, attached to it."* [Page 256, vol. 3]

THE WORDS OF TALAAQ-E-SAREEH

This much is clear from the above explanations that for the effectiveness of Talaaq-e-Raj`i, specific words are to be used, which clearly indicate such. These words are such that they are used only for Talaaq, regardless of what language is used. Allamah Ibn Aabideen states, *"Those words which are not used except for Talaaq, are regarded as Sareeh, and it takes effect, (even) without intention."* [Page 590, vol.2]

The author of *Badaa`i* has stated as follows, *"However, as for Sareeh, it is those words, which are not used except for severing the bond of Nikah. It is the words 'Talaaq' or 'Tatleeq'. For example, if a man says, 'You are divorced', or 'You are divorce' or 'I divorce you', or 'You are a*

divorcee'. Such words are regarded as Sareeh." [Page 1794, vol. 4]
An explanation is also offered in *Fataawa Aalimgiri, "They (the words of Talaaq) are; 'You are divorced', or a divorcee, or 'I divorce you'. One Talaaq-e-Raj`i will fall, regardless of whether he intended more than one or he had no intention at all. It is stated such in Kanz."* [Page 354, vol. 1]

If any of the abovementioned words are stated in any language, one Talaaq-e-Raj`i will take effect. The author of *Badaa`i* states, *"Indeed (the effect of) Sareeh does not change with the changing of languages."* [Page 1794, vol. 4]

This is the Fatwa, on condition that the words in another language are words which are used to indicate Talaaq.

"The authentic view is that this is the final ruling in our time...If the words used are such words, which are not used except for Talaaq. Thus such words are Sareeh, which effect a Talaaq, (even) without an intention." [Ibid.]

TALAAQ-E-SAREEH BAA`IN

Another type of Talaaq-e-Sareeh is that of *Baa`in*. Allamah Shaami (rahmatullahi alaihi) writes, *"However, the second type is different (to the first). It is (effected) with words of Ibaanat coupled with words of Talaaq. This could be prior to penetration of even after. It could be joined with three, or it could be clearly stated or by inference. It is stated with such descriptive words, which imply Ibaanat or indicate towards it, and there are no conjunctive words attached therewith."* [Page 592, vol. 2]

CLARIFYING A DOUBT

By this classification of Talaaq-e-Sareeh, one should not be under the misconception that since this is Sareeh then what is the need for having *Baa`in* and three Talaaqs. What is the reason for classifying Sareeh Baa`in?

Sareeh Baa`in will come into effect when all its conditions, which are inherent to it, are found. Sareeh Raj`i brings into effect one Talaaq-e-Raj`i, without it having any conditions attached to it. However, if Sareeh Raj`i does have any condition attached to it, then it will no longer be categorised as Raj`i but will now be Baa`in. This has been outlined above.

SOME KINAAYAH WORDS HAVE THE EFFECT OF RAJ`I

In the discussion of Raj`i, it would be appropriate to mention the few *Kinaayah* words, which will have the effect of Raj`i. Notwithstanding that these words are *Kinaayah*, they will have the effect of one Talaaq-e-Raj`i. The words of *Kinaayah* are ambiguous and may contain several meanings and imports. Together with their being used as an admonition or warning, there is the possibility of their referring to Talaaq.

It is for this reason that intention plays a very important in the matter of *Kinaayah*, so that the intention of the speaker is clearly known and there remains no doubt. However there are three words, which are excluded from this. Notwithstanding their being *Kinaayah*, they will be classified as one Talaaq-e-Raj`i. This will apply, even if

the speaker intended therewith Talaaq-e-Baa`in. All the authoritative Kitaabs of Fiqh explain this. It is stated in *Bahrur Raa`iq, "Thus one Talaaq-e-Raj`i takes place in the words; 'I`tadi' ('start counting your iddat'), 'Istabri Rahmaki' ('free your womb') and 'Anti Waahidatin' ('You are single')."* [Page 399, vol. 3]

It is stated in *Durrul Mukhtaar, "Talaaq-e-Raj`i takes effect with his saying, 'I`tadi', Istabri Rahmaki' and 'Anti Waahidatin', even though he may intend more than one."*[Page 641, vol. 2]

Ibn Aabideen (rahmatullahi alaihi) states further, *"Even if he intends Baa`in."* [Page 641, vol. 2]

At one juncture, Allamah Shaami (rahmatullahi alaihi) states, *"Like for some Kinaayah words, only one Raj`i takes effect. For example, 'I`tadi', Istabri Rahmaki' and 'Anti Waahidatin'."*[Page 639, vol. 2]

THE REASON FOR TALAAQ-E-RAJ`I TAKING EFFECT

The main reason is that in these three words, there is a clear unambiguity and Talaaq-e-Sareeh is hidden in them. The author of *Raddul Mukhtaar* explains, *"Because they are from the hidden pronouns."* That is, when the husband says, *"Start counting your iddat"*, he is saying, *"I have given you a Talaaq, hence start counting your iddat."* It is clear one Talaaq-e-Raj`i takes effect with these words. It is for this reason that the Fuqahaa have taken such words to refer to one Talaaq-e-Raj`i and they have classified it as such, notwithstanding their being from *Kinaayah*. Just as Allamah Shaami (rahmatullahi alaihi) explains that it means, *"I have given you a Talaaq,*

hence start counting your iddat." The said author has also explained *"Istabri Rahmaki"* in the same way. He says, *"Indeed it is Kinaayah for counting the iddat. It is as we have mentioned just now regarding `I`tadi'."*

The author of *Bahrur Raa`iq* has explained the reason for classifying *'Anti Waahidatin'*, under Raj`i as it being a description (*Sifat*) for a hidden root-word (*Masdar-e-Mahzoof*), that is *"Anti Mutallaqatun Bi Tatleeqatin Waahidatin."*

It is clear that one Talaaq-e-Raj`i takes effect with this. He states, *"However, as for 'Anti Waahidatun', it is a description for a hidden root-word (verbal noun). Its meaning is one Talaaq. Thus he intends this with the use of this description. It is as though he said it such."* [Page 299, vol. 3]

THE RULING OF THE AUTHOR OF BAHRUR RAA`IQ

The author of *Bahrur Raa`iq*, after expounding on these three words, makes the following comment, *"Thus it is clear that Talaaq takes effect by use of any of these three words, unless they are clearly stated, they have the effect of one Talaaq(-e-Raj`i). If they are to be taken as muzmir (personal pronouns), then owing to there not being proof to the contrary, the lowest (one Talaaq) will be taken into consideration."*

[Page 299, vol. 3]

It is clear that the usage of the above three words will have the effect of Talaaq-e-Raj`i, if there is an intention of Talaaq, since they are *Kinaayah* words, and all *Kinaayah* words are same in this ruling. The only difference (between these three words and other *Kinaayah*

words), is that here Talaaq-e-Raj`i will take effect and not Talaaq-e-Baa`in.

The main contributing factor which leads to the ruling that the use of these three words have the effect of Talaaq-e-Raj`i is the incident of Hadhrat Sauda (radhiallahu anha). The author of *Bahrur Raa`iq* has established that the original source of this ruling stems from this incident. He states, *"As stated in 'Nawaadir', that the effect of Talaaq-e-Raj`i, which is Istihsaan (subject to discretion), stems from the Hadith of Sauda (radhiallahu anha), when Nabi (sallallahu alayhi wasallam) said to her 'I`tadi`, and then he (sallallahu alayhi wasallam) made raj`at (took her back). And the Qiyaas (analogy) that Baa`in takes effect like all other Kinaayah words is far-fetched "* [Page 299, vol. 3]

By using the words 'far-fetched', the author of *Bahrur Raa`iq* is in actual fact refuting the *Qiyaas* of the author of *Nawaadir.* He is proving that Talaaq-e-Raj`i taking effect, conforms to both, *Istihsaan* and *Qiyaas. "In fact, the establishment of Raj`i is based on Istihsaan and Qiyaas."* [Ibid.]

THE INTENTION OF BAA`IN KHAFEEFAH (LIGHT) OR GHALEEZAH (HEAVY) IS NOT CONSIDERED

Similarly, if a person says that by using any of the three words stated above, he meant Talaaq-e-Baa`in or three Talaaqs, then his intention will not be taken into consideration. Neither will Talaaq-e-Baa`in or three Talaaqs take effect, only one Talaaq-e-Raj`i. For example if a man says to his wife, *"I have given you a Talaaq."* And he says that he meant thereby two Talaaqs or three Talaaqs, then his intention is not taken into consideration,

rather the words which are Sareeh (clear) will have the effect of one Talaaq-e-Raj`i. similarly, here also, only one Talaaq-e-Raj`i will take effect. This is regardless of whatever intention he holds, when saying these words. Ibn Aabideen (rahmatullahi alaihi) puts it very succinctly, *"Raj`i takes effect, even if he intends Baa`in."* [Shaami, Page 641, vol. 2]

Durrul Mukhtaar states, *"Even if he intends more (than one Talaaq)."*

The author of *Bahrur Raa`iq* states, *"The author indicates, by use of the words, 'one Raj`i', that even though he (the speaker of such words) intends Baa`in Kubra (permanent separation) or Baa`in Sughra (temporary separation), his intention will not be considered."* [Page 299, vol. 3]

THE DIFFERENCE BETWEEN A VIRGIN AND ONE WHO IS NOT

The ruling of a woman with whom intercourse had taken place or one with whom intercourse had not taken place is about the same. The difference only comes in the fact that the woman with whom intercourse had taken place has to observe *iddat* and the woman with whom intercourse had not taken place does not have to. Even though the first two of the mentioned words *'I`tadi'* and *'Istibri Rahmaki'* , refers to the woman passing her *iddat* after the divorce taking place, nevertheless, this (*iddat*) will not apply to a woman with whom intercourse had not taken place. However, the ruling (of one Talaaq-e-Raj`i) still takes effect.

A COMMON MISCONCEPTION

Nowadays many people labour under the misconception that when the husband gives a Talaaq-e-Sareeh then Talaaq does not take effect, because the husband did not have the intention of Talaaq. In fact, they say such words so as to frighten and caution the wife so that she never thinks of divorce. Some people even issue three Talaaqs in this way and remain contented. They claim that since they never intended Talaaq, how then can it be effective. If Talaaq is given once by Sareeh words, then Talaaq is effective and if it is given thrice, then the bond of Nikah is permanently severed thereby and it will be *haraam* for them to remain as man and wife. Even if there was absolutely no intention of divorce, but in matters of Sareeh, Talaaq takes effect. This has been explained in the foregoing pages. Yes, if one or two Talaaqs are given in this way then there is still the choice of *Raj`at* which is open to the husband, but where three have been given, there is no question of any return for the wife (except by *halaalah*).

The issue of Talaaq is a very precarious and delicate one. It is a matter of *halaal* and *haraam*. Every person must equip himself with the necessary knowledge and tread carefully within the bounds of the Shariah. If ever any such mistake has occurred then it should be rectified and Tawbah must be made.

Besides this, there is unanimity amongst ALL the Fuqahaa that if a man says to his wife "You are divorced", and even if he has absolutely no intention of divorce, still too, divorce takes effect and his intention will not be considered at all. The author of Badaa`i has explained it such, "If he says to her, 'Anti Taaliqun' (You are divorced'), and then he says that he meant that she is

'Taaliqun min Wathaaq' (freed from a pledge), or (he says he meant) that she is 'Taaliqun min Amal' (freed from working), his word will not be accepted in a court." [Page 1294, vol. 4]

IF SOMEONE SAYS TO HIS WIFE 'DIVORCEE'

If addresses his wife as 'Divorcee', then one Talaaq-e-Raj`i takes effect. However, if he says that he was mocking and was referring to the fact that she was divorced from her first husband, and if in actual fact it is so that she was married previously and her former husband divorced her, then his word will be accepted and she will not be divorced. This is borne out by the text in Shaami, *"If she indeed had a previous husband who divorced her and he (this new husband) says that he meant and was referring to that, then his word will be accepted."* [Page 593, vol. 2]

TO NOTIFY REGARDING A TALAAQ THAT IS GIVEN

If a man gives his wife one Talaaq and someone asks him regarding it, then if he says *'I gave my wife one Talaaq'*, then this will not be construed as a second Talaaq, and only the first Talaaq which he originally gave to his wife will be effective. The reason being that he is merely informing someone regarding something which he had already done. It is stated in *Bahrur Raa`iq, "If a man says to his wife, 'Anti Taaliqun' and if another man asks him what he said and he replies, 'I have divorced her' or he says, 'I said, 'Anti Taaliqun',' then only one Talaaq will be effective in a court, because this (subsequent words of Talaaq) are for information of someone else."* [Page 1796, vol.4]

However, this ruling will apply only if someone else (a third person) asks of the husband, other than this, if the words of Talaaq are repeated, then each one will be effective. If for example, if a man says to his wife, *"I have given you a Talaaq, a Talaaq"*, and he avers that the second time was not intended as a Talaaq, but merely for emphasis, then in such a case his claim will not be taken into consideration, because here there is no question of informing (a third party) and anyway it is not the forum for informing anyone. In any case, no one asked him what he said. Two Talaaqs will take effect.

It is stated in *Badaa`i, "If he says that he intended with the second (Talaaq) to inform (or emphasise) the first, his claim will not be considered in court."* [Page 1796, vol.4]

TALAAQ BY THE USE OF MISPRONOUNCED AND DISTORTED WORDS

Most of the time, people are at pains at trying to fathom some plan or the other in order to extricate themselves from the issue of Talaaq. These plans, sometimes they are sought prior to issuing Talaaq and many a times afterwards. Many persons in a spate of anger issue Talaaq without contemplating over the consequences, and afterwards they regret and try every possible trick in the book to extricate themselves. They run hither thither looking for a way out. It is for this reason that couples must conduct themselves in mature and intelligent ways.

There are times where words, which are used are not pronounced or spelt properly, but they still have the effect of Talaaq, if used. For example if the husband says to his wife, *"I give you one Tilaaq"*, *"I give you one Talaagh"*,

or he uses a *taa* in place of a '*twa*', etc. Thereafter, in an attempt at squirming out of the mess he landed himself in, he avers that he used the wrong words, or pronunciation. Now, if one contemplates over this a little one will realise that in this world there are numerous differences in accents and even in pronunciations. If the accents or pronunciation were to be really considered then there probably would be very few, if any, divorces in the world today.

Yes, there will be one isolated case where the argument of incorrect pronunciation may work, but even here caution is greatly stressed upon and advised. If a wife insists upon Talaaq, and the husband does not want to give it, but in order to give her a 'taste` of what she asks for, he mispronounces the words 'Talaaq', but he purposely uses the incorrect letters. Here also, there is a condition, prior to using these words, the husband should get two witnesses, and explain to them that he is using these words purposely in order to caution and scare his wife and that he has no intention of Talaaq.

The author of *Bahrur Raa`iq*, has explained this matter of mispronounced words in great detail. He states, "*They are five, Talaaq (with a taa), talaagh (also with a taa), talaagh, talaak and talaak (with a taa). This (a Talaaq) will be effective in court, and his (husband's) claim (to the contrary) will not be considered unless he has witnesses prior to his using the words, where he tells them that his wife is seeking a Talaaq from him, but he has no intention to give her Talaaq, hence he is saying it like this.*" [Page 252, vol. 3]

THE LEARNED AND ILLITERATE ARE EQUAL

Insofar as an unlearned person is concerned, there is no question of using mispronunciation, since their normal usage would not always be proper. However, even for an Aalim, it would be contrary to his status if he uses the excuse of mispronunciation as a means of escaping the damage. The author of *Bahrur Raa`iq* clearly states the *Mufta Behe* ruling, and he states that there is no difference between an Aalim and an unlearned person and in both cases Talaaq will be effective and mispronunciation cannot be cited as an excuse, unless of course the prescribed conditions are adhered to. He states, *"There is no difference between an Aalim and a Jaahil, and upon this is the Fatwa."* [Page 252, vol. 3]

THE CHAPTER REGARDING INDICATION IN TALAAQ

In the discussion of Talaaq, the matter of attributing and indicating the Talaaq also holds importance. For the Talaaq to take place and be effective, just as there are other conditions, the condition of indicating the Talaaq also holds a place. That is, the Talaaq is indicated towards the woman to whom it is directed. It should not be such that a person intends Talaaq for his wife, but he indicates towards some other woman.

Indication is effected in two ways, actual indication, that is, if someone says *'I Talaaq my wife'*. Now, in such a case, there is no possibility that he is referring to another woman. The second way is by inference, where for example, a man points towards his wife and says, *'Talaaq for this woman'*, or *'This woman is divorced'*.

In such cases, this is sufficient for the Talaaq to be effective.

It is not necessary that the indication be clear and unambiguous. In fact, an indirect and inferred indication is sufficient for Talaaq to take place. For example if a person just says, *'Talaaq'*. Then it is quite clear that by the mere mentioning of this word, one knows not who this Talaaq applies to. However, by inference, we know that if a man issues a Talaaq, then he issues it to none other than his own wife and not to any other woman. Therefore, in such a case also, the ruling of Talaaq being effective is given. A detailed and concise explanation of this is given by Allamah Ibn Aabideen. He says, *"By omitting an*

inferred indication, Talaaq does not take place, because this is a condition. Together with an inferred indication, if there is reference, for example, 'This one is divorced', or 'My wife is divorced', or 'Zainub (i.e. he mentions his wife's name) is divorced." [Shaami, Page 590, vol.2]

In another place, he says, *"It is not necessary for the indication to be clear, as mentioned in Bahr. If a man says, 'Talaaq', and if it is asked of him, 'Who do you mean?". His reply will be, 'my wife'. His wife will then be divorced."* [Ibid]

This is the reason why if the woman's name, her father's name, mother's name or child's name is taken and Talaaq is given, then it will be effective. The reason being, that in the first place it is clear, and secondly, the indication explicitly indicates towards the woman. Allamah Ibn Aabideen states, *"If he mentions her name, or the name of her father, mother, or her child, and he says, 'Amrah in divorced', or 'daughter of Mr. so and so', or 'daughter of Mrs. so and so', or 'mother of so and so', then it is clear that his wife is divorced."* [Page 591, vol. 2]

From this discussion it is clear that it is not necessary to mention the name of the woman for Talaaq to be effective, even the mentioning of a title or nickname of hers would be sufficient for Talaaq to take place. The crux of the matter is that in whatever way indication is made, and inference can be made that it refers to the wife, then Talaaq is effected. Even if after using the abovementioned inferences, the husband denies that he meant his wife, then his word will not be taken into consideration, just as his word will not be taken into consideration in Talaaq-e-Sareeh. Talaaq will be effected.

Allamah Shaami states, *"If he says, 'I did not mean my wife', his word will not be considered."* [Page 591, vol. 2]

He states in another place, whilst explaining Talaaq-e-Sareeh, *"Indeed Sareeh is not dependant upon intention. However, its ruling (for Talaaq being effected) is necessary, both in court and morally, for that person who refers the word Talaaq to his wife, knowing well its meaning."* [Page 593, vol.2]

From this we understand that the person giving the Talaaq must know the meaning and import of the word. It is for this reason that if a person repeats the word 'Talaaq', whilst he is oblivious of its meaning and usage, then Talaaq will not be effected. This is borne out by the text in Shaami, *"However, if a man repeats the word 'Talaaq', and he does not know its meaning, then Talaaq will not be effected."* [Ibid]

SPEAKING ABOUT AND REPEATING THE MASAA`IL OF TALAAQ

Similarly if a person continuously repeats the word *'Talaaq'* whilst teaching or explaining to his wife, or he reads out from a Kitaab, *"Anti Taaliqun" (You are divorced)*, or he repeats any other word which implies Talaaq, then in all such cases Talaaq will not be effected. Yes, if whilst mentioning any of these words, he intends Talaaq for his wife, then Talaaq will be effected. Allamah Shaami (rahmatullahi alaihi), sums this up in one sentence, *"Talaaq is not effected as long as he does not intend his wife."* [Page 593, vol.2]

Together with this, one should understand that with the repetition of the word of Talaaq, it will not be effected

because there is no intention of Talaaq. The object is merely to teach. However, if one repeats the word with the intention of Talaaq, then whether he is doing it whilst speaking to others, or he does not know the meaning of what he says, the ruling of the Mas`alah will change. That is, in this case, not knowing the meaning of the word is irrelevant if there exists intention. Talaaq will be effected even if he does not know the meaning of what he says, because he has the intention of Talaaq. Allamah Shaami (rahmatullahi alaihi) explains the Mas`alah under discussion of the sentence, "*Without knowing its meaning*", he states, *"If the wife says to the husband, 'Say to me, 'Start your iddat, you are divorced thrice'. If he does so, the court will rule in favour of three Talaaqs, even if he did not know (the meaning of hat he said) or he did not intend (Talaaq)."* [Page 584, vol. 2]

CLARIFYING A DOUBT

A doubt is sometimes created that if the wife is not present, then in such a case if the husband issues a Talaaq, it will be effective. The presence of the wife is not necessary. Then the question will arise that since the wife is absent, there can be no indication, so how can the Talaaq be effective?

The answer to this is that even in her absence, indication is found. Either the husband is specific in his issuance of Talaaq, or there is some indication which leads any understanding or knowledgeable person to come to the conclusion that he is speaking about his wife and nobody else. Therefore, in such instances as well, the Talaaq will be effected. In essence, the presence of the wife is not necessary at the time of Talaaq, neither is her knowledge

of being divorced a condition for the effectiveness of the Talaaq.

This is the reason why if any husband takes an oath on Talaaq, then his wife is divorced, even if there is no mention made of his wife.

Allamah Shaami (rahmatullahi alaihi) has clearly spelt out this *mas`alah, "It is natural (and obvious) that only a person who is married will take an oath on Talaaq, and not anyone else."* [Page 591, vol.2]

"YOU TAKE YOUR TALAAQ"

If the husband says to his wife, *"You take your Talaaq"*, whereupon the wife replies, *"I have taken it"*. One Talaaq-e-Raj`i will take effect. There will be no consideration taken of any intention or absence thereof.

"If he says, 'Take your Talaaq', and she replies, 'I have taken it', then one Talaaq takes effect hereby, without any condition of intention. This is stated in 'Fathul Qadeer'."[Shaami, Page 591, vol. 2]

As a matter of fact, the author of *Bahrur Raa`iq* goes as far as stating that one Talaaq-e-Raj`i takes effect by the mere statement of the husband, *"You take your Talaaq"*, and there is no need for the wife's reply. It is stated in Shaami, *"There is no condition for her to say, 'I have taken it', according to Bahr."* [Page 591, vol.2]

Similarly, the under-mentioned words, also constitute one Talaaq-e-Raj`i, even in the absence of any intention:

"'I am pleased with your Talaaq', 'Take a Talaaq for yourself', 'I have gifted you a Talaaq', even if there is no intention here (with the mentioning of these words), one Talaaq (-e-Raj`i) will take effect." [Ibid]

THE RULING OF INTENDING TALAAQ

If the husband says, *"I intended to give you one Talaaq,"* or *"I will give you a Talaaq"*, then in such instances no Talaaq will take effect, since he is merely expressing his intentions. It is stated in Fataawa Qaadhi Khaan, *"If he says, 'I intend to divorce you', a Talaaq will not be effected."* [Page 385, vol. 1]

It is stated in Fataawa Aalimgiri, *"It is stated in Muheet, that if the husband says (using the future tense), 'I am going to divorce you', this is not a Talaaq."* [Page 410, vol.1]

ISSUING TALAAQ IN JEST

Insofar as Talaaq is concerned, even joking and jesting takes the effect of a true Talaaq. It is reported from Nabi (sallallahu alaihi wasallam), *"Hadhrat Abu Hurairah (radhiallahu anhu) reports that Nabi (sallallahu alaihi wasallam) said, 'Three things- their seriousness is serious and their jesting is serious- Nikah, Talaaq and Raj`at (taking a wife back)."* Narrated in Tirmidhi, page 284 (Mishkaat)

Hence, if a man jokingly divorces his wife, then she is in actual fact divorced. In further substantiation of this, we will quote the texts of some Fuqahaa.

It is stated in *Durrul Mukhtaar, "As for (issuing Talaaq in) jest and jokes, indeed a Talaaq takes effect, according*

to (Shar`i) law and Allaah Ta`ala, because 'Shaar`i' (Nabi- sallallahu alaihi wasallam) has stated that its jesting is also serious." [Page 585, vol.2]

Allamah Shaami states the reason for this as, *"Because he has intentionally spoken with reason, hence its ruling and effect must necessarily apply to him, even though he may not be pleased with it."* [Ibid]

THE WORDS OF TALAAQ EMERGING BY MISTAKE

When even jesting and joking is taken into consideration as being effective in Talaaq, then why should a mistake be overlooked. If a person, mistakenly says, *'I have divorced you"*, in place of *Subhaanallah*, etc. then these words are clear and one Talaaq takes effect. Clear and Sareeh words take effect immediately as divorce, and no consideration is made of a mistake, etc. This is clearly stated in *Raddul Mukhtaar, "He intended to say 'Subhaanallah', but the words, 'I divorce you', came out of his lips, then a Talaaq will be effected, because it is a clear and Sareeh statement, which is not in need of any intention."* [Page 584, vol.2]

If the words of Talaaq come out in forgetfulness or unwariness, and if indication is made towards one's wife, then one Talaaq takes effect. It is stated in *Durrul Mukhtaar, "Or unwarily (Talaaq emerges from the husband's lips), or forgetfully, then a Talaaq will take effect."* [Page 585]

TALAAQ WHICH IS ISSUED IN ILLNESS

The Talaaq which is issued by an ill person will be effective, provided he is in his senses. The author of

Raddul Mukhtaar states regarding the ill person, *"That is, his senses and intelligence are not affected by illness."* [Page 585, vol.2]

The Talaaq of an ill person will be considered if his senses are not affected and he is aware of what he is saying, and his condition is not very serious. However, if Talaaq is issued in terminal illness, then the ruling will change. The discussion on this is lengthy. In such instances the issuer of Talaaq is called a *"Faar"* (one who is trying to escape), because he is trying to deprive his wife of inheritance and by issuing a Talaaq he is escaping therefrom.

"He is called a 'faar' because he is running away from giving her inheritance." [Shaami, page 715, vol.2]

However, the ruling of *'Firaar'* will only be applied if a Talaaq-e-Baa`in or three Talaaqs are issued, because in such cases inheritance falls away. One who issues a Talaaq-e-Raj`i is not regarded as a *"faar"*. It is stated in Shaami, *"(The ruling of 'faar') is applied to Baa`in, because the ruling of 'firaar' is established thereby. 'Firaar' is not established by Raj`i."* [Page 721, vol.2]

THE RULING OF TERMINAL ILLNESS

Such an illness where the onlookers realise that there is no hope for this sick person, will be classified as a terminal illness (*maradul maut).* If this person passes away during this illness, then the rulings for a Talaaq given in this state vary. If a person gave his wife a Talaaq in his terminal illness, whereafter he died during her iddat, then she will inherit in his estate. This will however, apply only if he issued a Talaaq-e-Raj`i. if the husband gave a Talaaq-e-Baa`in, then there are a few possibilities. Either he issued a Talaaq upon the wife's insistence or he did so at the last moments in order to deprive her of inheritance. If the former applies, then there is no share in the inheritance for her, since she desired the Talaaq. However, if the latter applies, then she will stand to inherit.

However, if the man is walking around and in sound mind, and in this state he issues a Talaaq, then he will not be regarded as *faar*, since he is not in terminal illness, and whatever Talaaq he issues in this state will be effective. It is stated in *Raddul Mukhtaar*, "*If he is able to execute tasks in the home, like wudhu, going to toilet, etc. then he is not regarded as faar.*"[Page 715, vol.2]

A RULING

If a woman asked her husband for a Talaaq during his terminal illness, and he issued it. Then he passes away before her iddat expires, she will inherit. Yes, if she asked for a Talaaq-e-Baa`in and he issued it, then she will not inherit, because in this case the woman has deprived her own self of her due rights.

"Similarly, the seeker of Talaaq-e-Raj`i, will inherit* [Durrul Mukhtaar], *contrary to the seeker of Talaaq-e-Baa`in." [Shaami Page 719, vol. 2]

ONE PRINCIPLE

The ruling for such a Talaaq where the bond of Nikah is not immediately broken, but remains intact until the expiry of the iddat, is that the wife will inherit ¼ of the husband's wealth if there are no children, and if he has children, she will receive 1/8 of his estate. It is clear that in Talaaq-e-Raj`i, the wife remains in the bond of Nikah until the expiry of her iddat, however, in Talaaq-e-Baa`in, there is a difference of opinion. The ruling for Talaaq-e-Raj`i, will remain the same whether one or two Sareeh Talaaqs were issued. Allamah Shaami (rahmatullahi alaihi) states, *"The bond of relation remains from the time of the Talaaq until the time of death (i.e. within the iddat period)."* [Page 719, vol.2]

Qaadhi Khaan has expounded on this principle in more detail, *"The principle is that if any one of the partners decides to separate from the other at the time where the other has a right on the wealth of the former, then in such a case inheritance will be established."* [Page 502, vol.2]

THE DIFFERENCE OF OPINION REGARDING TALAAQ-E-BAA`IN

If during the terminal illness of a man, his wife says, *"Give me a Talaaq"*, and she does not specify the number or type, and then the husband, instead of a Talaaq-e-Raj`i issues a Talaaq-e-Baa`in or three Talaaqs, then although the bond of relations is severed, she still stands to inherit (if he dies before her iddat completes), because the request of the wife was for a general Talaaq, which is

Raj`i, and the husband acted to the contrary. Allamah Shaami (rahmatullahi alaihi) states, "*That is, because she said to him in his terminal illness, 'divorce me', and he divorced her thrice, and then he died before the expiry of her iddat, she will inherit. Her rights will not be deprived, since the husband had initiated it, by opposing her request for a Talaaq-è-Raj`i.*" [Page 719, vol.2]

IN TALAAQ-E-RAJ`I BOTH THE HUSBAND AND WIFE INHERIT

In Talaaq-e-Raj`i, just as the wife stands to inherit if the husband passes away, so too will the husband inherit from the wife if she passes away. That is, if a man issues a Talaaq-e-Raj`i, with or without the request or happiness of the wife, whether he is terminally ill or healthy, and she passes away before the expiry of her iddat, then he will inherit in her estate.

THE RIGHT OF THE HUSBAND

Just as the children of a woman and other heirs inherit in her estate, so too will the husband inherit. It should not be said that since the husband has given a Talaaq, now he is deprived of inheritance. He had issued a Talaaq-e-Raj`i, and this does not immediately sever the bond of Nikah. In fact, she still remains his wife, until the expiry of the iddat. It is stated in Fataawa Aalimgiri, "*When a man divorces his wife, with one Talaaq-e-Raj`i, whether in his illness or health, whether with her pleasure or not. And then he passes away in her iddat period, then both of them will inherit from the estate of each other (i.e. if she passes away, then he will inherit from her). This is the unanimous ruling.*" [Page 462, vol. 1]

Allamah Ibn Aabideen has also explained this ruling, "*If any one of them passes away whilst she is still in iddat, the other (surviving partner) will inherit.*" [Page 719, vol.2]

Qaadhi Khaan has also expounded on this Mas`alah, "*Similarly, if the wife passes away in her iddat, the husband will inherit in her estate.*" [Page 503, vol.2]

THE MEHR (DOWRY) OF A DECEASED WOMAN IS ALSO PART OF INHERITANCE

If a woman passes away, and her husband had not yet paid her Mehr (this usually occurs where the Mehr is deferred at the time of Nikah, and the husband generally delays in fulfilling this debt), then this amount also forms part of her estate. That is, just as all her other belongings and wealth are distributed amongst her heirs, the Mehr must also be included in this distribution. Since the bond of Nikah is not completely severed (if she passes away in iddat), then the husband also has a ¼ share of this outstanding Mehr if the wife had children, and if she had no children, then he has ½ a share in it.

DISCUSSION ON REPETITION OF TALAAQ

The discussion on repetition is also important in the chapter of Talaaq. In mere repetition of the words, there is a great possibility of the ruling also being repeated. Prior to stating the various rulings and circumstances, it would be appropriate to begin with a principle stipulated by the Fuqahaa.

PRINCIPLE

After contemplating over the various possibilities, the Fuqahaa have extracted the following general rule which applies to all Masaa`il and corollaries in this discussion. The principle is that the *'Ta`sees'* origin is preferred to the *'Ta`keed'* emphasis. That is, two parts of the speaker's speech emerges – the one is the emphasis and the other the original. The actual and original intention of the speaker is known as the *'Ta`sees'*. For example, if Zaid said to his wife, *"Anti Taaliqun, Taaliqun, Taaliqun. (You are divorced, divorced, divorced)"*. The word divorce emerged thrice from his lips. Now, if he says that he only intended one Talaaq, and the second and third were for emphasis, then according to the Shariah, Zaid's claim will not be considered. In fact, it will be said to him that since his claim was to divorce her, then according to the principle of the Fuqahaa, the second and third time he used the word 'divorce' it will hold the same standing as the first and his wife will be divorced with three Talaaqs.

However, as far as Allaah Ta`ala is concerned the matter will be between him and his Creator, since here, his intention of emphasis will be considered. It has been established from the Ahaadith where Nabi (sallallạhu

alaihi wasallam) had laid consideration on the apparent and left the matter of the perpetrator's intention to Allaah Ta`ala.

Allamah Ibn Nujaim (rahmatullahi alaihi) has stated in *Al-Ashbaah Wan Nazaa`ir, "Ta`sees is better (given preference) than Ta`keed, when both the meanings can be extracted from one sentence. In such cases Ta`sees will be accepted as the import. It is for this reason that if a man says to his wife, 'You are divorced, divorced, divorced", then the Fuqahaa have ruled for three Talaaqs. If he claims that he said (the second and third) as emphasis, then his word may be accepted Diyaanatan (in the Sight of Allaah Ta`ala) but not Qadaa`an (in a Shar`i court)."* [Page 149] [Page 1386, in the print of *An-Nashr Wa Tauzee`* of Cairo]

<u>A FEW MASAA`IL WITH REGARD TO REPEATING WORDS (OF TALAAQ)</u>

1. If a man gives his wife one Talaaq-e-Raj`i and during her iddat, he says to her, "*I have given you a Talaaq*", then two Talaaqs will be effected.
2. If a man says to his wife, "*You have one Talaaq, one.*" Then only one Talaaq becomes effective.
3. *If someone says to his wife, "I divorce you." Thereafter, he says to her, "O divorcee!" Another Talaaq will not be effected with this second sentence. Only one Talaaq-e-Raj`i will be effected. It is stated in Fataawa Aalimgiri, "If a man says, 'You are divorced once, once", then only one divorce will be effected. If he says to her, 'You are divorced", and then he says to her, 'O divorcee!' another Talaaq will not be effected (by this second sentence)." [Page 356, vol. 1]*

THE REQUEST OF THE WIFE

1. If the wife says to the husband, *"Give me Talaaq and Talaaq and Talaaq"*, and the husband replies, *"I have given you Talaaq"*, then three Talaaq-e-Mughalazzahs will take effect, even if the husband did not intend three Talaaqs. *"And if the wife says to her husband, 'Divorce me, divorce me and divorce me.' Then the husband says, 'I have divorced you.' Three Talaaqs will take effect, whether the husband intended three or not."*[Fataawa Aalimgiri, Page 356]
2. Similarly, if the wife says to her husband, *"Give me Talaaq, give me Talaaq, give me Talaaq"*, without the use of a conjunctive word (*and*), and if the husband says, *"I have divorced you"*, then if he intends three Talaaqs, three will be effective, otherwise not. [Ibid]
3. If the wife says to her husband, *"Give me a divorce"*, and her husband retorts by saying, *"You are not my wife"*, then the Fuqahaa have ruled that even in the absence of any intention from the husband one Talaaq will be effected, because he said this in reply to her sentence. It is clearly expounded in Fataawa Aalimgiri, *"If the wife says to her husband, 'Divorce me', and her husband says to her, 'You are not my wife', the Fuqahaa rule that this reply of his brings one Talaaq into effect, and there is no need for any intention."* [Page 356, vol.1]
4. If the wife says to her husband, *"Divorce me"*, and the husband retorts by blurting, *"You are single"*, then here also one Talaaq takes effect.

5. If the wife says, "*Give me Talaaq*", and the husband replies by saying, "*I have done so*", then too one Talaaq takes effect.
6. If in any one of the above five cases, the wife says, "*Make it more*", and the husband says, "*I have done so*", then in such cases two Talaaqs take effect. In similarly way, three can even take effect. [Fataawa Aalimgiri, page 356, vol.1]
7. One Mas`alah in *Muheet* is stated such that if a woman says to her husband, "*Give me three Talaaqs*", whereupon the husband replies, "*I have made you Baa`inah*", then three Talaaqs take effect.
8. However, (in the above case), if the husband says, "*You are divorced*", then only one Talaaq will take effect. It is stated in *Siraajul Wahaaj*, that if a husband says, "*I have divorced you*", in reply to the wife's request for three Talaaqs, then three Talaaqs take effect, because this sentence is a reply to three, which indicates emphasis. [Aalimgiri, page 356, vol.1]
9. Similarly, if the wife says to the husband to divorce her, and he replies thrice, "*I have done so, done so, done so*", then three Talaaqs take effect. [Fataawa Majmu`un Nawaadir, page 470, vol.2]

IF SOMEONE HOLDS THEIR WORDS

1. If someone had the intention of divorcing his wife and says the letter "*T (first letter of 'Talaaq'*", and stops right there or someone else closes his mouth so that no more letters may emerge, then even though this person had the intention of divorcing his wife, a Talaaq will not be effected. As is stated in Aalimgiri from Bahrur Raa`iq, "*If*

he leaves out the 'laam' and 'qaaf' (of the word Talaaq) and merely says the 'twaa', and then he remains silent or someone else closes his mouth, then a Talaaq does not take effect, even though he may have intended it. It is stated so in Bahr." [Page 357, vol.1]

2. If someone holds his mouth shut, and immediately upon leaving, the word *"Three"* emerges, then three Talaaqs take effect. It is stated in *Bahrur Raa`iq, "If someone holds his mouth, and then (upon releasing) he says, 'Three', then three Talaaqs will take effect. This will be so if these words emerge immediately upon releasing the hands from his mouth."*[Page 507, vol.1]
3. If the wife says, *"Give me Talaaq"*, and someone immediately holds the husband's mouth, and immediately upon releasing, he blurts out, *"I have already done so"*, then a Talaaq takes effect. [Ibid]

A PRINCIPLE

With regard to this discussion, one principle should be kept in mind, and that is if the wife asks in clear and unambiguous terms for a Talaaq, where she says, "*Give me a Talaaq*", then if in answer to this the husband replies in words or sentences which indicate Talaaq, like he says, *"I have divorced you", "You have a Talaaq", "You are divorced", "I have given it to you", "You are single", "You are free", "I have released you"*, etc. then in such cases the request of the wife is fulfilled. One Talaaq-e-Raj`i takes effect.

However, one should remember that whether the wife requests one or three Talaaqs, the choice of giving this is

up to the husband. It is up to him to give her one, two or three, or whether to remain silent or even to refute her request. The choice of the Talaaq taking effect is completely up to the husband.

This principle has been stated by Allamah Ibn Aabideen in *Raddul Mukhtaar* such, *"The principle is that the Talaaq will only take effect and the request of the wife will be fulfilled in the answer of the husband. If the choice of Talaaq is given to the wife and she exercises that upon herself, then it takes effect. Hence if the wife says, 'Divorce me', and the husband replies by saying, 'You are haraam', 'You are Baa`in', 'You are free', etc. then Talaaq takes effect."* [Page 663, vol.2]

Mas`alah: If the wife says to her husband, *"If I had the choice of Talaaq, then I would have divorced myself from you a thousand times"*, and if in reply, the husband blurts out in anger, *"I give you a thousand"*, three Talaaqs take effect. [Azeezul Fataawa]

THE RULING OF TALAAQ UNDER DURESS

Although most of the time, the ruling (of Masaa`il) changes in the case of force and duress and the usual ruling does not apply, nevertheless, in some cases the ruling will apply and be considered. The Mas`alah of Talaaq is amongst the few where it applies even under duress and force. For example if someone threatens a man to divorce his wife otherwise ..., and out of fear he divorces his wife, then the divorce will be effective, on the condition that he said it verbally.

The author of *Durrul Mukhtaar,* states, *"The Talaaq of every husband is effected, be he a slave or under duress."*

TO STATE IT VERBALLY IS NECESSARY

However, one point should be remembered that if a person is forced to issue Talaaq to his wife and he does not do so verbally, then the Talaaq is not effected.

WRITTEN TALAAQ UNDER DURESS

Similarly, if a man is forced to divorce his wife and he writes out a Talaaq on paper and he even signs it, but he does not mention anything (i.e. any words of Talaaq) with his tongue, then the Talaaq is not effected. There will be no Talaaq as long as he does not mention anything verbally. Allamah Ibn Aabideen states, *"If a man is forced to write out a Talaaq for his wife, and he writes it out, then Talaaq is not effected, because the written word is in the place of text, which is done out of necessity, and there is no necessity here. It is stated such in 'Khaaniyah'."* [Page 579, vol.2]

"It is stated in 'Bazaaziya' that if a man is forced to divorce his wife, and he writes out, 'So and so, daughter of so and so is divorced', the divorce is ineffective." [Bahrur Raa`iq, Page 246, vol.3]

However if the husband happily wrote out the Talaaq and signed his name thereupon, then the Talaaq will be effected, on the condition that he read out what he wrote or if the writer is someone else and the husband reads out what is written.

A SIMPLE METHOD

If ever, Allaah Ta`ala forbid, a man is faced with such a situation where he is under duress to give his wife Talaaq, then he should merely write the words out, and even if he has to sign it, it will be meaningless and the 'Talaaq' will be ineffective.

THE DISCUSSION ON 'DIYAANATAN' (in the Sight of Allaah Ta`ala) AND 'QADHAA`AN' (in an Islaamic court of Law)

Regarding the subject matter under discussion, sometimes both, *Diyaanat* and *Qadha* are considered, sometimes only *Diyaanat* and sometimes only *Qadha.* Just as how these two words and their meanings are different, so too will their respective rulings be.

Wherever the word *Diyaanat* is used in this discussion, then it means that the matter of the Talaaq is on the conscience and honesty of the one who issued it. Its being effected or not effected depends completely upon his intention. That is, only he and Allaah Ta`ala know the true state of affairs. In Fiqhi terms this is called, *'Feema Baynahu wa BaynAllaah' (between him and Allaah).*

The meaning of *Qadhaa`an* is that for example if a man issues three Talaaqs and he says that his intention (of the second and third) was for emphasis, then *Diyaanatun*, his intention may be acceptable, but in front of a judge, this intention of his will not be considered at all, and the ruling of three Talaaqs will be made, because a court decision is not based upon intention. It is based on outer information only.

Since this matter has to do with society and the well-being of the family, the judge has a responsibility towards society. Contrary to a Mufti who has no such responsibility or right (as a judge). However, owing to the present times and situations, even the Muftis will be obliged to give the ruling of three Talaaqs in such a case.

Allamah Shaami states, *"The Mufti will consider his intention and give a ruling accordingly. However a judge will not consider his intention and rule for three Talaaqs, because this (his intention) is contrary to the apparent, and there is no mitigating factor to prove otherwise."* [Page 593, vol.2]

THE WISDOM OF RULING IN FAVOUR OF TALAAQ GIVEN IN THE STATE OF INTOXICATION

There is absolutely no doubt in the fact that Allaah Ta`ala had bestowed mankind with innumerable blessings. If we take just one blessing of Allaah Ta`ala, which is intelligence, then one will never be able to give due appreciation and thanks to Allaah Ta`ala for it, even if he has to prostrate his entire life. Everything is in the total control of Allaah Ta`ala. Man does not even have control of his own life. Let alone that, man is not master of his own limbs, in that he can cut off any one of them and replace it with another.

Now one should consider and contemplate that when he has no control over his smallest of limbs if it is destroyed, then what about a great blessing like the intelligence? What a great oppression and disfavour not upon himself when he destroys his intelligence and clouds it with the consumption of alcohol? Even if it may be for a few minutes or hours.

Nevertheless, a person is liable for a severe punishment for this utterly heinous crime. It is for this reason also, that the Shariah has stipulated that if a man issues a Talaaq to his wife in even the most severe state of intoxication, the Talaaq is effected. This is so because he is still responsible for his actions and he had wilfully perpetrated this state upon himself. The Shariah is not responsible for his actions. There is no loophole for him in the Shar`i law.

He had loaded upon himself calamity upon calamity. First he intoxicates himself, and then he goes and divorces his wife. What, does he then think that he is absolved of all responsibility? Must his actions be then overlooked? Definitely not!

If he behaves like this, then he is merely increasing in his sin and transgression. He is causing mayhem and destruction to society. It is for all such reasons that the Shariah had stipulated that a Talaaq given in the state of intoxication is effected. Perhaps, his filthy habit will be broken and he will learn some lesson for the future.

THE RULING OF TALAAQ ISSUED IN THE STATE OF INTOXICATION

Firstly one should remember that the Talaaq issued in the state of intoxication is effected according to the Shariah, but not every state of intoxication is included here. If any of those intoxicants which have been decreed as haraam in the Shariah, like alcohol, drugs, etc. are consumed, and in this state of intoxication a person divorces his wife, then the divorced will be effected.

There are some things, which are not haraam in the Shariah, but they may intoxicate, like for example, tobacco. If a person who is not used to taking tobacco consumes it or if one who is habituated consumes more than is tolerable, then it could intoxicate him. Some people become intoxicated by consuming an excess amount of food. There is a small grain of which is found in Bengal and such areas, know as *'Kodo'*, which also intoxicates, and its effect lasts for a few hours.

Like these there may be other things which can bring about intoxication. If a person is intoxicated by the consumption of such things, and he issues a Talaaq to his wife, then this Talaaq will not be effected.

Allamah Shaami (rahmatullahi alaihi) states, "*The ruling is that if a person is intoxicated by using haraam means, then he is not absolved of responsibility, and the rulings will apply to him. His words and dealings in Talaaq, I`taaq (freeing slaves) and business transactions, will be binding.*" [Page 582, vol.2]

The author of *Raddul Mukhtaar* states, "*If his sanity is affected by a headache or with any halaal thing, then Talaaq (given in this state) will not be effected.*" [Page 583, vol.2]

THE TALAAQ OF A DUMB PERSON

The signs, gesticulations and actions of a dumb person is many a times understood. Since most of his communication is executed by signs, the Shariah has equated this (his signs/gesticulations) as being in place of his speech. It is for this reason that the Talaaq of a dumb person issued by signs is also considered, on the condition that the particular sign used is well known as being one which indicates Talaaq or at least it is clear that by the particular sign he means Talaaq. Similarly, one, two or three Talaaqs can be executed in this way. By dumb is meant the person who is born with this deformity or he has a temporary dumbness due to some ailment, where he has to communicate with people by means of signs and gesticulations. It is clearly expounded in Shaami, *"(By dumb) Is meant the person who is born dumb, or some ailment befalls him where his signs are well-understood. Otherwise, he is not considered as dumb."* [Shaami, page 584, vol.2]

The author of *Bahrur Raa`iq* has further elaborated on the Talaaq of a dumb person, *"That is, if the husband is dumb, then his Talaaq is effected by signs, because this is (his) understood (means of communication)."* [Page 248, vol.3]

The author of *Durrul Mukhtaar* states, *"By his usual signs, because indeed it is like (in the place of) the speech of a normal person."*

TALAAQ-E-RAJ`I OF A DUMB PERSON

As long as he (the dumb person) indicated to less than three Talaaqs, then it is considered as Talaaq-e-Raj`i.

Whether he gives one or two, it is effected. Even if he gives three Talaaqs, then it is effected. It is explained thus in *Shaami*, *"His Talaaq is understood by signs. If it is less than three, then it is Raj`i."* [Page 584, vol.2]

THE RULING OF THE WRITTEN WORD OF A DUMB PERSON

The Fuqahaa have written that if a dumb person knows how to write, then his Talaaq by means of signs is of no consequence. Such a person must write out his Talaaq for it to be effective, because the written word is clearer than sign language. Also, the use of signs is only a temporary means of communication, since he knows how to write, then what is the need for sign language?

The author of *Bahrur Raa`iq* states, *"Some of the senior Mashaaikh have stated that if he (the dumb person) knows how to write, then his Talaaq by means of indication is not considered, because there is no need for gesticulations, where a clearer and more understandable means (of communication) is available to him."* [Page 248, vol.3]

THE TALAAQ OF AN INSANE OR IMMATURE PERSON

For the effectiveness of Talaaq, one of the conditions is that the person issuing the Talaaq is sane and mature. The Talaaq of an insane person is not effected. Similarly, the Talaaq of an immature child, until he does not reach the Shar`i stipulated age of maturity, is not considered. The Shar`i stipulated age for maturity is fifteen years of age, or if semen emerges from the private part, in whatever way.

The author of *Badaa`i Wa Sanaa`i* states, *"And amongst the conditions of Talaaq is that he be sane, literally or figuratively. The Talaaq of a mad/insane person is not effected, nor that of an immature boy, who is not of an understanding age. Indeed intellect is a condition of dealings."* [Page 179, vol.4]

The author of *Bahrur Raa`iq* states, *"Immaturity is general, which includes intelligence. Even though he may be a Muraa`iq (close to maturity), because he does not yet qualify to transact any dealing (or administer his own affairs)."* [Page 249, vol.3]

THE TALAAQ OF THE WALI (GUARDIAN) OF AN IMMATURE BOY

Many people labour under this misunderstanding that if the husband is an immature boy and the wife a mature woman, and for some reason or the other she is unhappy with the union, and desires extrication therefrom, then the Talaaq is sought and issued on behalf of the boy by his Wali. Such a Talaaq is ineffectual and of no consequence. In such instances, great sin and mayhem is caused, where the woman labours under the impression that she is divorced and she later marries someone else, whereas she live is a perpetual state of adultery.

If a woman is ever faced with such a distraught situation, where she seeks freedom from an immature boy, then she has to make an application to the Islamic Court (where available) or to a reliable Ulama committee, who will be able to annul the marriage, if her need and reasons are genuine. It is obvious and clear that any ruling of annulment from an un-Islaamic court is ineffectual and of no Shar`i consequence.

THE TALAAQ OF A DEMENTED PERSON

A demented person is also a type of insanity. His mind and intellect is imbalanced and unjust. His intellect becomes obscured, where his sanity is lost. Such a person is deprived of proper reasoning and thinking. Such a person's Talaaq is ineffective and not valid. However, upon attaining sanity and consciousness, if he gives Talaaq, then it will be accepted. [*Tahtaawi,* page 110, vol.2]

TALAAQ ISSUED BY A PERSON AFFLICTED WITH PLEURISY

Pleurisy is also regarded as a type of insanity. Such a person's Talaaq is also not valid. In medical terms this is such an illness which begins with a growth that appears close to the liver, and it slowly reaches the brain. [*Raddul Mukhtaar*, page 586, vol. 2]

THE TALAAQ OF A FAINTING PERSON

Since a fainting person's intellect is weakened and adversely affected, if such a person gives his wife Talaaq, then it will be ineffectual and invalid. [Ibid]

THE TALAAQ OF A SEMICONSCIOUS PERSON

A person who is semiconscious or in such a state where his intellect is clouded and his recognition is impaired, where he cannot discern between a man and woman, earth and sky, such a person's Talaaq is also not valid. The author of *Bahrur Raa`iq* has also counted this as a form of insanity.

Allamah Shaami (rahmatullahi alaihi) also states that the Talaaq of such a person is not valid. He states, "*Indeed a*

semiconscious/stunned person is similar to an insane. His Talaaq is invalid." [Page 586, vol. 2]

Such a person is also one who due to old-age is afflicted with an illness where the intellect is affected and they are temporarily incapacitated. The speech of such a person is not considered, as long as this condition lasts.

TALAAQ GIVEN WHILST ASLEEP

If a person gives his wife Talaaq in his sleep, then this is invalid, since the words spoken in this condition is of no consequence and such a person has no control of what he says in his sleep. A sensitive and delicate matter such as Talaaq can never be considered whilst a person is asleep. The conditions of Talaaq are also not found in a sleeping person.

Allamah Ibn Aabideen (rahmatullahi alaihi) not only disregards the speech of a sleeping person, he considers it as baatil. *"The Talaaq of an immature boy and a sleeping person are baatil."* [Page 588, vol.2]

He states in another place, *"Contrary to the speech of a sleeping person, which is not considered, according to all."* [Page 588, vol.2]

In fact, he has said that the speech of a sleeping person would not even be classified as speech at all. He states, *"Indeed the speech of a sleeping person is not called speech, neither literally nor according to the Shariah."* [Ibid]

THE DISCUSSION ON COMMON LAW

The Fuqahaa have laid great stress upon the common law of society, in that many a times rulings are made in accordance to the general law of the land. Nevertheless, it should be noted that if any common law or practice of

people conflicts and is contrary to the Shariah, then it is rejected and not considered at all.

A FEW MASAA`IL REGARDING THE OVERWHELMING COMMON LAW

In this regard the author of *Durrul Mukhtaar* has made mention of some Masaa`il under the discussion of commonly used words. Talaaq is sometimes effected by the use of such words, even without intention, because in normal dialogue such words are used in this context, hence intention is of no consequence. There are times where the common law takes the place of intention. [Shaami, page 594, vol.2]

It is stated in Shaami, *"Such commonly used words are clear and not Kinaayah, hence there is no need for intention."*

He states further, *"Such words are regarded as Sareeh since they are use as such in common terms for Talaaq."* [Page 594, vol.2]

Allamah Shaami (rahmatullahi alaihi) has written that although the words, *"You are haraam for me"*, are attributed to Talaaq-e-Baa`in and are in need of intention, they are considered as effecting a Talaaq-e-Baa`in even without any intention because they are commonly used terms. [Page 584, vol.2]

"YOUR TALAAQ IS MY RESPONSIBILITY"

The reason why such a sentence will not constitute a valid Talaaq is because it is not commonly used for Talaaq. [Shaami, page 955, vol.2]

AN IMPORTANT POINT

This much must be remembered that if any words are used specifically to denote Talaaq, and they are well known in society as such, then their usage in any language, even without any intention will effect a Talaaq. It will be imperative to give a ruling accordingly. It is stated in *Raddul Mukhtaar, "Those words which have become famously known to denote Talaaq, and they are not used for any other meaning (other than Talaaq), then it will be Waajib to rule in favour of a Talaaq (if such words are used), and there is no need for any intention."* [Page 555.vol.2]

"I HAVE LET YOU GO"

Such words are known to refer to Talaaq, and their usage would effect a Talaaq. However, if the husband used these words only once, then one Talaaq-e-Raj`i would come into effect and he has the choice to take his wife back. If he says it thrice, then three Talaaqs come into effect. It will then be impermissible for him to retain his wife without *halaalah.* This has been clearly stated in *Bazaaziyah.* [Shaami, page 638, vol.2 / Bazaaziyah page 199, vol.1]

"I HAVE FREED YOU"

This sentence is also well known to denote a Talaaq. Its usage once or twice will constitute one Talaaq-e-Raj`i. If it is used thrice then a Talaaq-e-Mughallazah will come into effect and the couple cannot reunite except with *halaalah.* Many people use these words in their spells of anger and suffer the consequences thereof. Even in the absence of any intention, the ruling for Talaaq will have

to be given in such instances. This has been clearly borne out by the texts of Shaami and Bazaaziyah.

"YOU ARE HARAAM FOR ME"

The use of these words will effect a Talaaq-e-Baa`in, whether said with or without any intention of Talaaq. Nevertheless, only a renewal of Nikah will be necessary to remedy this. Since these words are commonly used in the context of Talaaq, hence the condition of intention does not apply. A Talaaq will be effected even in the absence of intention. This is the ruling for the present times. [Shaami, page 770, vol.2]

The ruling of the latter day Ulama is that a Talaaq is effected. [Shaami, page 761, vol.2]

"If the husband says to her (his wife), 'You are haraam for me', and haraam denotes Talaaq, then it will be effected, even if he did not intend so." [Bazaaziyah, page 188]

"I AM FREE OF YOU"

If someone said this, even with the intention of Talaaq, then it will not be effected. However if he said, "*I am Baa`in from you*", or "*I am haraam for you*", then if he said it with the intention of Talaaq, Talaaq-e-Baa`in will be effected. [Shaami page 613, vol.2]

SOME MASAA`IL REGARDING THE WORD 'HARAAM'

Regarding this word, the Fuqahaa have mentioned some Masaa`il, where a Talaaq-e-Baa`in is effected even in the absence of any intention.

Allamah Shaami (rahmatullahi alaihi) states, "*There is no difference between his saying, 'Muhrimah', I have made you haraam', 'Halaal Muslims are haraam for me', 'Every halaal thing is haraam for me', 'You are living with me in haraam'*". [Page 338, vol.2]

The use of any of these words will effect one Talaaq-e-Baa`in. yes, the couple may reunite during the iddat period or after with a renewal of the Nikah, without having to make *halaalah.* Allamah Ibn Aabideen (rahmatullahi alaihi) has added another point, "*It has been mentioned previously that the words, 'Allaah Ta`ala's halaal things are haraam for me', whether it is mentioned in Arabic, Persian (or any language), there is no need for intention for these words, the correct preferred view is that a Talaaq is effected, due to it (these words) being common usage in this context.*"[Page 486, vol.2]

From this we understand that the ruling of Talaaq will be given regardless of what language is used.

The author of *Bahrur Raa`iq* has added a few more words to this list, "*I am haraam for you, I have made myself haraam for you. It is stated in Qeeniyah, that if he says, 'You are a haraam woman', and he did not intend Talaaq, it will be effected, Qadaa`an and Dinyaanatun.*" [Page 301, vol.3]

If a man says to his wife, "*You are haraam upon me a thousand times*", then one Talaaq-e-Baa`in will be effected. [Shaami, page 764, vol.2]

TO REPEAT THE WORDS, "YOU ARE HARAAM FOR ME" MANY TIMES OVER

It should be noted that after a Talaaq-e-Baa`in has been effected another Talaaq-e-Baa`in cannot be effected (immediately thereafter). Therefore if a man uses any sentence where a Talaaq-e-Baa`in is effected and thereafter he repeats the same sentence a thousand times over only one Talaaq-e-Baa`in will come into effect.

It is stated in Shaami that if a man gives his wife a Talaaq-e-Baa`in and during the iddat he states more sentences which constitute Talaaq-e-Baa`in, then all these subsequent sentences will be ineffectual and invalid. No subsequent Talaaq will be effected. [Page 647, vol.2]

He states in another place, *"If he repeats it, none will not be effected except the first one, because a Baa`in cannot be joined to another."* [Page 765, vol.2]

It is stated in *Bahrur Raa`iq, "If the husband says, 'You are haraam upon me', a thousand times, only one Talaaq ill be effected."* [Page 389, vol.3]

REMOVING A DOUBT

Here one may wonder what the object of the above discussion is all about, that one Baa`in cannot enter upon another. Talaaq-e-Baa`in is effected by Kinaayah and sometimes with Sareeh words as well. So, therefore, will the above discussion apply to the former type of Baa`in or the latter? The answer to this you will find in the statement of Allamah Ibn Aabideen (rahmatullahi alaihi),

"That Baa`in which does not enter upon another is with regard to those which are effected with Kinaayah." [Page 647, vol.2]

He writes quoting from *Fathul Qadeer*, ***"The object of that Baa`in which does not enter upon another is Kinaayah."***

This is the view of almost all the Fuqahaa as stated by Ibn Aabideen (rahmatullahi alaihi). [Page 646, vol.2]

THE RULING OF SAREEH FROM KINAAYAH

This is also understood that those words which are Kinaayah but are counted amongst Sareeh, like *"You are single"*, etc. since they are not included amongst the Kinaayah, they can be joined to a Baa`in. [Shaami, page 648, vol.2]

TO GIVE THREE TALAAQ-E-SAREEH AFTER A TALAAQ-E-BAA`IN

If a man gives his wife a Talaaq-e-Baa`in and then during her iddat period he gives her three Sareeh Talaaqs, for example he says to her, *"You are haraam upon me, and then he says, you have three Talaaqs*", etc. then three Talaaqs will be effected and the couple will not be able to reunite except after *halaalah*. It is clear that three Talaaq-e-Sareehs, although they have the effect of Baa`in, nevertheless, since they are Sareeh, they will be considered after a Talaaq-e-Baa`in. In this case the Sareeh can be joined to a Baa`in. it is stated in *Raddul Mukhtaar*, ***"If a man gives his wife a Baa`in, then he gives her Talaaq (-e-Sareeh) in her iddat, it will be effected."*** [Page 646, vol.2]

"It is clear that three Talaaq-e-Sareeh can be joined with a Talaaq-e-Baa`in." [Ibid]

TO TELL THE WIFE, "YOU ARE HARAAM ON ME LIKE MY MOTHER/SISTER"

If a man tells this to his wife, then one Talaaq-e-Baa`in comes into effect, whether he has intention of it or not.

Mas`alah: If a man says to his wife, *"Your Talaaq in my responsibility"*, then Talaaq does not take effect. But if he says, *"It is necessary upon me"*, *"Waajib upon me"*, *"binding upon me"*, *"Fardh upon me"*, then the preferred view is that a Talaaq does come into effect. When a man makes something binding upon himself, when it was not so, then its ruling comes effective. It is stated in Shaami, *"According to Khaami, the reason (for the Talaaq) is its becoming effective with his words. Talaaq was not Waajib or binding upon him, but he made it so; hence it was not effected except after he mentioned the words."* [Page 587, vol.2]

However, the author of *Bahrur Raa`iq* has based this upon two things; his intention and generally accepted terminology. That is, if such words are generally accepted amongst the masses as referring to Talaaq, then it will effect a Talaaq, even in the absence of intention. However, if such words are also generally accepted as meaning something other than Talaaq, then the ruling will be based on his intention. If he has intention then Talaaq will be effected otherwise not. [Shaami, page 597, vol.2]

Nevertheless, Allamah Shaami (rahmatullahi alaihi) states unequivocally that the Talaaq will be effected, and this is the preferred view. [Page 596, vol.2]

"If the husband says, 'Your Talaaq is Waajib upon me', or he says, ' Your Talaaq is binding upon me', a Talaaq is effected according to Imaam Abu Hanifah, even in the absence if any intention. This is the preferred and Mufta Behe view." [Page 597, vol.2]

TALAAQ TO YOUR HEAD/NECK

With regard to this, one should understand the principle that Talaaq cannot be broken up. Secondly, if Talaaq is attributed to any part of the body, which when mentioned is generally accepted to refer to the entire body, then a Talaaq will be effected. As stated by Allamah Shaami (rahmatullahi alaihi), *"When (the mentioning of a particular body part) is generally accepted as referring to the entire body, then it will not be necessary to acquire the testification of all the people, in fact, (it will be accepted as such) as long as it is so according to the speaker."* [Page 599, vol.2]

So for example, if a man says to his wife, *"You have ½ a Talaaq", "1 ½ Talaaq" or "3 ¼ Talaaq"*, then the fractions will be counted as whole parts, hence, in the first case one Talaaq will be effected, two in the second and three in the third, since Talaaq cannot be subdivided and is counted as whole.

It is stated in the reliable Fiqhi Kitaab *Al-Ashbaah Wan Nazaa`ir* that Talaaq is amongst those things which cannot be subdivided and a fraction is counted as a whole. *"If a man gives ½ a Talaaq to his wife then one Talaaq will be effected, or if he divorces ½ the woman then also one Talaaq will be effected."* [Page 162]

Therefore, if a man says to his wife, *"Talaaq to your head/neck"*, etc. then one Talaaq will be effected. [Shaami, page 588, vol.2]

TALAAQ TO YOUR HANDS/FEET

There are some limbs I the body, which when spoken about do not refer to the entire body. If Talaaq is attributed to any of those limbs, then it will be regarded as useless talk and a Talaaq will not be effected. [Shaami, page 507, vol.2]

However, if Talaaq is intended by being attributed to any of the under-mentioned limbs, then a Talaaq will be effected, *"Talaaq is not effected if attributed to the hands, except if there is an intention (for Talaaq). Similarly, the feet, buttocks, hair, nose, shin, thighs, back, stomach, tongue, ears, mouth, chest, chin, teeth, saliva and perspiration. The same ruling will apply to the blood as well."* [Page 600, vol.2]

If any of these organs or limbs are not generally accepted by the masses in the locality to mean the entire body, then Talaaq will not be effected unless he intends so. However, if they do refer to the entire body, then a Talaaq will be effected even in the absence of intention. [Ibid]

"TALAAQ IN YOUR PATERNAL HOME"

If a man says to his wife, *"Talaaq for you until your wali comes"*, *"Upto your paternal home"*, *"Talaaq in your house"*, *"Talaaq in the sunshine"*, *"Talaaq in the shade"*, etc. then one Talaaq-e-Raj`i will be effected. One will not wait for the paternal home or Wali. Yes, he may take her back during her iddat period. It is clear that the period of taking her back lasts until the end of the iddat. If he waits

until the expiry of the iddat, then a renewal of the Nikah will be necessary.

"If he says, 'Talaaq to you from here to Shaam', then one Talaaq-e-Raj`i will be effected. If he says, 'Talaaq for you until Makkah', or 'in Makkah', or 'in the house', or 'in the shade', or 'in the sunshine', or 'in clothes', then one Talaaq-e-Raj`i will be immediately effected." [Page 603, vol.2] *"His refutation may be accepted Diyaanatun but not Qadhaa`an*

"TALAAQ TO YOU UNTIL TONIGHT"

If a man says this or, *"Talaaq until the end of the month/ Year/ season"* etc. then if his intention was a Talaaq, then a Talaaq will immediately be effected. If his intention was the time period specified, then at the expiry of the time specified a Talaaq will be effected. However, if he did not intend Talaaq, then at the expiry of the time specified by him, a Talaaq will be effected. [Shaami, page 604, vol.2]

ATTRIBUTING TALAAQ TO A SPECIFIC PERIOD

As mentioned before with valid proofs that Talaaq cannot be subdivided. Similarly is the condition of attributing Talaaq to a specific period of time. If a man specifies a specific period for Talaaq, then it will be effected in the first part of the specified time. For example if a man says to his wife, *"Talaaq to you tomorrow"*, or *"day after tomorrow"* or *"after ten days"*, or *"after a month"*, then the Talaaq is effected as soon as the specified time arrives, so if he specified the next day, then the Talaaq will be effected at the time of dawn. It is stated in Shaami, *"If he says, 'Talaaq to you tomorrow', or 'in tomorrow', the Talaaq will be effected at the time of true dawn."* He states the reason as follows, *"The Talaaq will be effected*

at the time of dawn, because he had attributed the Talaaq to the whole of tomorrow, hence the first portion thereof is considered." [Page 606, vol.2]

Similarly, if he attributed the Talaaq for the month of Shaaban or any other month, then the Talaaq will be effected with the coming of that particular month. If he says, *"Talaaq to you today tomorrow"* or *"tomorrow today"*, then the first word will be considered and the Talaaq will be effected at that time.
If he says, *"Talaaq to you today or tomorrow", "at night or during the day", "At the beginning of the day or beginning of the night"*, then in such cases two Talaaq-e-Raj`i will fall, because he had attributed Talaaq to two times. When the second of the mentioned times come, then the second Talaaq will be effected. The full details on this can be found in Shaami, page 606, vol.2.

However if someone gave a Talaaq before the Nikah of he says, *"Talaaq to you today"*, and the Nikah is for the next day, then Talaaq will not be effected. Since the woman was not his wife at the time of his making the statement, the Talaaq will be invalid. [Shaami, page 607, vol.2]

TALAAQ AFTER DEATH

If a man said to his wife, *"Talaaq after my/your death"*, then Talaaq will not be effected. [Ibid]

TALAAQ EVERY DAY

If a man tells his wife, *"Talaaq to you every day"*, then only one Talaaq-e-Raj`i comes into effect, regardless of how many days pass or what intention he had. [Shaami, page 608, vol.2]

GIVING TALAAQ BY MEANS OF INDICATION BY FINGER

Talaaq can be effected by means of indication of finger, since according to the Shariah and common practice, indication by finger is considered as a means of communication. In a Hadith, Nabi (sallallahu alaihi wasallam) indicated to the Sahaabah (radhiallahu anhum) the number of days in a month by means of his fingers, when he said, *"A month is like this, and this.."*, he made this gesture thrice (to indicate 30 days). It is therefore apparent that the fingers can be used as a means of communication, hence if a man shows three fingers to his wife and says that he gives her so many Talaaq, then three Talaaqs will be effected. If he shows two fingers then two Talaaqs. [Shaami, page 615, vol.2]

If a person shows with his fingers and says, *"For you is so much Talaaq"*, and if he intends three then three will be effected, otherwise only one Talaaq-e-Baa`in. Contrary to the first instance, where intention is not necessary. Allamah Shaami (rahmatullahi alaihi) states, *"Only one Baa`inah will be effected. It will be like his saying, ' For you is a thousand Talaaqs'."* [Page, 625, vol.2]

However, if by his indication he did not intend amount of Talaaqs, but merely intended showing his palm, then *Diyaanatun* his word will be accepted, but in a Shar`i court, a ruling of three Talaaqs will be given. [Shaami 615, vol.2]

Mas`alah: If a person gives his wife Talaaq and he indicates with three fingers, but he does not say anything about three, but he has intention of three Talaaqs, then in

such a case only one Talaaq will be effected. This ruling is so in *Qaadhi Khaan*. Allamah Shaami (rahmatullahi alaihi) states, *"If he says, 'You are divorced', but he indicates with three fingers and he also intends three Talaaqs, but he does not say anything with his tongue (to this effect), then only one Talaaq becomes effective."* [Page 616, vol.2]

Similarly, if the wife asks for Talaaq, and the husband indicates with three fingers, then even if he intends three Talaaqs, but does not say anything verbally, no Talaaq will be effected, until and unless he says so with his tongue. [*Khaania,* page 398, vol.1]

ANOTHER MANNER OF EFFECTING TALAAQ-E-BAA`IN

We are presently discussing Talaaq-e-Baa`in. It has been mentioned earlier that there are also times where Sareeh words effect a Baa`in Talaaq. Hereunder are mentioned some words, which are coupled with the word, *'Talaaq'*, but instead of effecting a Talaaq-e-Raj`i, a Baa`in Talaaq is effected. In a Talaaq-e-Raj`i, there is the possibility of the husband taking his wife back during the iddat period, but in Baa`in there is no such possibility. A renewal of the Nikah has to be made. Amongst the examples is if the husband says, *"For you is Talaaq-e-Baa`in"*, *"A houseful of Talaaq"*, *"Shaitaan's Talaaq"*.

"A Talaaq-e-Baa`in is effected if he says to her, 'For you is Talaaq-e-Baa`in', 'Talaaq-e-Batta', 'An evil Talaaq', 'Shaitaan's Talaaq', 'Talaaq-e-Bid`at', 'A bad Talaaq', 'Mountain-full of Talaaq', 'A thousand Talaaqs', 'A houseful of Talaaqs', 'A severe Talaaq', 'A long Talaaq', 'A very severe Talaaq', 'A broad Talaaq', 'A large

Talaaq', `A filthy Talaaq', 'A very big Talaaq', 'A very long Talaaq', 'A very wide Talaaq', 'A very large Talaaq, 'A very harsh Talaaq'. In each of these cases one Talaaq-e-Baa`in will be effected." [Shaami, Page 618, vol.2]

If in the use of any of these words three Talaaqs is intended then three Talaaqs will be effected. [Ibid]

"FOR YOU IS A THOUSAND TALAAQS MANY TIMES OVER"

If a man says the following to his wife, then three Talaaqs become effective. The wife becomes Mughallazah and without *halaalah*, then couple cannot reunite. *"Like if he says, 'Many times Talaaq', 'You are divorced many times, thousand times', 'Not more and not less', then three Talaaqs will take effect. This is the preferred view".* [Shaami, page, 618, vol.2]

Allamah Shaami (rahmatullahi alaihi) quotes from *Bahrur Raa`iq, "If he says, 'For you is Talaaq many times over', then three Talaaqs come into effect, if she is not a madkhool beh."*

If the wife has not been penetrated by the husband, then she is regarded as *'Madkhool beh'*. For such a woman only one Talaaq-e-Baa`in will be effected.

EXPLANATION OF "LIKE A QAADHI"

Great caution should be exercised in matters of Talaaq insofar as *Diyaanatan and Qadhaa`an* are concerned. There are some Masaa`il where the Fuqahaa have granted the woman the mantle of *"Like a Qaadhi"*. There is a principle in Fiqhi terms called *"The woman is in the place of the Qaadhi"*. This does not mean that the woman can

make decisions and rulings like a Qaadhi. It means that if the husband ever gives his wife Talaaq-e-Baa`in or three Talaaqs, then he wishes to keep and withhold her without *halaalah* or a new Nikah, because besides the two of them there are no other witnesses, and the wife has no proof, other than being witness, then the Shariah has allowed her the right to become like a Qaadhi. If she is certain that he did in fact give her Talaaq, and in order to save herself from sinning by remaining to live with him as a wife, it will be obligatory for her to keep away from him and not indulge in any cohabitation with him. If he forces himself on her, then she has to run away or find some way to save herself from him. If after exploring all avenues, the wife fails and cannot save herself from the errant 'husband', then the final sin will be on him, and not her. It is stated in *Bahrur Raa`iq, "The woman is like a Qaadhi, if she hears (the words of Talaaq from the husband) or some reliable person conveys this message to her, it is not halaal for her to succumb to her husband."*

It is stated in *Fataawa Bazaaziyah* that in such a case the woman must immediately present her case to the Qaadhi of the land and if the woman has no proof with her, then the Qaadhi will ask the husband to take an oath that he did not say so. If he takes the oath, then the ruling will be given in his favour and the sin (of the union, if the wife's claim was correct) will be on the husband's head. [Bahrur Raa`iq, page 257, vol.2]

GIVING TALAAQ TO A FEW WIVES

Upto now we have only been discussing Talaaq to one wife. If a man has two or more wife and he issues a Talaaq without specifying which wife, then what is the

ruling? Will it apply to one or all the wives? Does a Baa`in or Raj`i come into effect?

If a man who has more than one wives, says, "*One Talaaq to my wife*", and he does not specify any one of the wives, then only one Talaaq comes into effect, and the husband has a choice as to which wife it will be. As Allamah Shaami (rahmatullahi alaihi) states, "*Contrary to Sareeh, which he gives to his wife, and he has more than one wife, then one Talaaq will only be effected for one wife.*"

If a man has two wives and both of them are well-known, and if he issues a Talaaq, then he has a choice as to which wife it applies to. [Shaami, page 630, vol.2]

If he says, "*Talaaq to all of them*" and he does not specify any name or quality, and if he has four wives then one Talaaq will be effected on each of them. The same ruling will apply if he has three wives, however, if he has two wives, then he will have a choice as to which of the two it applies to. Although there is a difference of opinion on this matter, we will consider the preferred view. It is stated in Shaami, "*Muhaqqiq Ibn Humaam (rahmatullahi alaihi) has opted for the view that Talaaq will be effected on all of them, because all were included in his statement. This is the clear ruling.*" [Page 631, vol.2]

If a man says to his four wives, "*One Talaaq amongst all of you*", then one Talaaq-e-Raj`i will be effected on each one of them. Similarly, if he says this of two, three or four Talaaqs, then one Talaaq will be effected on each one of them, on the condition that he does not intend this for only one of them. In that case the ruling will be changed.

Allamah Shaami (rahmatullahi alaihi) gives the reason for one Talaaq being effected on each of them, *"The reason for one being effected on each of them in this case is that a portion of a Talaaq equals one Talaaq, as has been mentioned earlier."* [Page 631, vol.2]

If he said to his four wives, *"For you all is five/ six/ seven/ eight Talaaqs"*, then two Talaaqs will be effected on each of them. [Shaami, page 632, vol.2]

If he increases on eight, then three Talaaqs will be effected on each of the wives. [Ibid]

If a man with two wives, both of whom had been penetrated by him, says, *"My wife is divorced, my wife is divorced"*, then one of them is divorced and the husband has the choice which one it will be. [Ibid]

NOT MENTIONING THE WIFE'S NAME

As has been mentioned earlier, it is a condition that the husband attribute the Talaaq to his wife, otherwise, it will be useless and invalid. This is however sometimes effected by direct means and at other times by indirect means. Indirect means is when there is some relation or factor which lends to the fact that he is referring to his wife, although he has not referred to her directly. Even if he does not mention the wife's name or indicate towards her, this will not alter the ruling of Talaaq being effected, since it is obvious that he is referring to his wife and not any other woman. It is mentioned in *Durrul Mukhtaar, "If a man says, 'My woman is divorced', and he does not mention her name, whilst it well known that he has a wife, then she is divorced."*

Since this will be the ruling in the case of his not mentioning her name, if he mentions her name, then all the more will a Talaaq be effected. [Shaami, page 632, vol.2]

Mas`alah: If he says, *"Talaaq to so and so, the daughter of so and so"*, then a Talaaq will be effected even if he does not intend so. It is stated in Shaami, *"If he says, 'Talaaq to so and so, the daughter of so and so', and then he avers that he meant another stranger woman by mentioning that name, his word will not be accepted and his wife will be divorced."* [Page 632, vol.2]

If a man, whose wife's name is Raheemah, says, *"Talaaq to Raheemah"*, and he avers that he meant the wife of his neighbour, whose name is also Raheemah, then one Talaaq will be effected for his wife. If he has two wives, Raheemah and Kareemah, then Talaaq will be effected on both of them. [Shaami, page 632, vol.2]

Similarly, if the man does not mention the name of his wife but he attributes the Talaaq to her mother, child, etc. then too a Talaaq will be effected. For example, if he says, *"Talaaq to Zaid's mother"*, and his sons name is Zaid, then one Talaaq will be effected for his wife. The excuse that he did not use his wife's name, so how can Talaaq be effected, will not be accepted as some ignorant people proffer. *"Similarly, if he gives a Talaaq and attributes her to her mother, sister or child, it (a Talaaq) will be effected."* [Page 632, vol.2]

IF THE WIFE'S NAME IS "TAALIQ" (DIVORCEE)

If a man's wife's name is *"Taaliq"*, and he calls her by that name, then if he intends Talaaq, it will be effected

otherwise not. Although the word is Sareeh, an intention is necessary because it is also her name. If it was not her name, then even in the absence of any intention a Talaaq would be effected. [Ibid]

"TALAAQ TO THIS DOG"

If a man says the above to his wife, then one Talaaq will be effected, even in the absence of any intention, since it is not necessary to mention her name, an indication is sufficient. [Durrul Mukhtaar]

"There is no need or consideration of description and name if there exists an indication/gesticulation" [Shaami, page 633, vol.2]

The object is that if a man points towards his wife and says, *"Talaaq to ..."*, but instead of using his wife's name he says another name, then this other name will not be considered and one Talaaq will be effected upon his wife.

"TALAAQ TO THIS BLIND ONE"

If a man says the above to his wife, whereas she can see properly with both her eyes, then too, due to his indicating towards her, it will effect a Talaaq, regardless of whether he meant her nor not. [Shaami, page 633, vol.2]

Mas`alah: If a man points to his wife and says, *"O Zainub, Talaaq to you"*, whereas his wife's name is Zainub, then later on it is discovered that the woman he pointed to was not his wife but some other woman, then too, one Talaaq will be effected on his wife, since the mentioning of her name will negate his indication. [Ibid]

"TALAAQ FOR YOU ON ALL FOUR MATH-HABS"

If a man says the above to his wife, then according to Allamah Shaami (rahmatullahi alaihi), one Talaaq-e-Raj`i will be effected on his wife. [Page 633, vol.2]

"TALAAQ FOR YOU ACCORDING TO THE JEWISH RELIGION"

If a man says the above or *"...according to the Christian religion"*, then one Talaaq-e-Raj`i will be effected. [Shaami, page 633, vol.2]

"TALAAQ FOR YOU ACCORDING TO THE RULING OF THE FUQAHAA"

If a man says the above, then according to a court one Talaaq will be effected. *"(If a man says to his wife) 'Talaaq to you according to the ruling of the Fuqahaa', or '...according to the court/ Muslims/ Qur`aan Majeed', then according to the court a Talaaq will be effected, not Diyaanatan, unless he intended a Talaaq."* [Shaami, page 633, vol.2]

"TALAAQ TO THE WOMEN OF THE WORLD"

If a man says the above or, *"Talaaq to the women of the universe"*, then a Talaaq will not be effected upon his wife. This is the view of Imaam Abu Yusuf (rahmatullahi alaihi). The "Mufta Behe" ruling is on this view, according to Shaami, page 633, vol.2.

However, instead of using the word, 'universe' or 'world', he says, *"Talaaq to the women in this city/village/town"*, and his wife is also amongst them, then a Talaaq will be effected upon her. [Fataawa Khaania, page 396, vol. 1]

A Talaaq will also be effected on the wife if a man says, *"Talaaq to the women in this street/house/building"*. [Durrul Mukhtaar]

TALAAQ IN A SOCIAL GATHERING

If someone takes this oath in a gathering, *"The first person to speak after this will have one Talaaq effected upon his wife."* And if this person happens to be the first to speak thereafter, then the Fuqahaa have ruled unanimously that his wife is divorced from him, since he is also included in that gathering. [Shaami, page 635, vol.2]

SILENCE AFTER ONE TALAAQ

If a man remains silent after saying to his wife, *"Talaaq to you"*, and this silence is the duration of one breath (and not longer), and immediately thereafter he says, *"Thrice"*, then three Talaaqs will be effected. If he remained silent by purpose, then only one Talaaq will be effected. Similarly, if after giving Talaaq to his wife, someone asks him how many Talaaqs he gave, he immediately replies, *"Three"*, then three Talaaqs will be effected. [Khaania, pages 400/1, vol.1]

PARENTS INSTRUCTING TALAAQ TO BE GIVEN

At the very outset we had mentioned that Talaaq is amongst the most abhorred of all permissible acts in the Sight of Allaah Ta`ala. Neither is it a good act nor is there any goodness in it. It is an act perpetrated in times of real need. Therefore, if the parents of a man order their son to divorce his wife, then it is not obligatory for the son to obey his parents. If he does not carry out their

instructions, he will not be sinning. ***"There is no obedience of the creation in the disobedience of the Creator."*** [Hadith]

Since there is sin which will emanate from this action, hence it will not be necessary to carry out their instructions.

However, if the wife is grossly disobedient, has an evil character, troubles the husband greatly, does not fulfil his rights, upsets the marital union, perpetrates evil and haraam actions, then in such cases, the son should obey the instructions of his parents. In fact, it will be necessary for him to do so. It is stated in *Lam`aat*, *"If the right and truth inclines towards the side of the parents, then it is Waajib to obey them"*

"IF I WANT TO KEEP, THEN I WILL KEEP MY MOTHER"

If a man says the above to his wife, then it is neither *Zihaar*, nor Talaaq. Nevertheless, to say such things is a great sin. One should always abstain from blurting out such talk. Details on *Zihaar* will come later on, Insha-Allaah.

IT IS NOT A CONDITION THAT THE WIFE IS IN THE PRESENCE OF THE HUSBAND (AT THE TIME OF TALAAQ)

Firstly it should be well understood that the act of Talaaq is an abhorred one in the sight of the Shariah, except in cases of real need. Therefore, there are times when consent is sought, and there are other times, when the husband effects a Talaaq and the wife is not even present. In such cases, whether the Talaaq given is Baa`in, Raj`i or Mughallazah, its coming into effect is not dependant on

the presence or even the awareness of the wife. A condition for Talaaq is that a wife does exist, her presence at the time of Talaaq, is not necessary. **Hence, Talaaq given to a woman who is not present at the time of it being effected is valid and acceptable.**

DRAWING THREE LINES AFTER SAYING, "TALAAQ TO YOU"

This Mas`alah has passed previously where after giving a Talaaq, the husband indicates with three fingers. If he says that he meant three Talaaqs, then three Talaaq will be effected. [Bahrur Raa`iq, page 286, vol.2]

Similarly, if a man divorces his wife and thereafter draws three lines on the ground and says that each line represents a Talaaq, then three Talaaqs are effected on his wife, and they can only reunite after *halaalah* has been carried out.

TALAAQ IS GIVEN BUT QUANTITY IS NOT SPECIFIED

If a man gives his wife Talaaq in the state of anger, then Talaaq is effected, as has been mentioned earlier. However, if he had not specified the number of Talaaqs given, then a ruling will be given according to the overwhelming circumstances and state of mind. If the overwhelming possibility is that he meant three Talaaqs or more, then a ruling will be passed accordingly, and they will only be able to reunite after making *halaalah.* If he meant two or one, and this is the overwhelming thought in his mind or he has certainty of this, then he should act on this and the Talaaqs will be regarded as Raj`i, (provided he used Sareeh words), whereafter he may take her back, if he wishes.

SAYING, "I GAVE OR HAVE GIVEN TALAAQ"

By saying this also, Talaaq is effected. If it is said thrice then three Talaaqs are effected, and the couple cannot reunite without *halaalah*. There is a famous principle of the Fuqahaa, *"Indeed a sentence in past tense is a sentence (applicable) in present tense."* [Durrul Mukhtaar]

TO INDICATE WITH FINGERS TO THE WIFE

*If the wife requests for Talaaq, and the husband indicates with his three fingers and says nothing with his tongue, then whether he has intention or not, Talaaq will **not** be effected. This applies even if the husband intended three Talaaqs, because in such a case verbal confirmation is necessary and mere intention is insufficient. [Qaadhi Khaan, page 397, vol.2]*

CHANGING THE WIFE'S NAME AND GIVING TALAAQ

If a man purposely or mistakenly changes his wife's name and gives Talaaq, that is, instead of saying his *Zainub* (his wife's real name) he says *Amrah*, then in a court Talaaq will be considered as being effected, whereas Diyaanatan, it will not be effected. [Shaami, page 461, vol.2]

TAKING THE WIFE'S SISTER'S NAME INSTEAD OF THE WIFE'S NAME

*If someone schemes such a sentence where he uses his sister's-in-law name instead of his wife's name, and gives a Talaaq, then a Talaaq will **not** be effected on his wife.*

SAYING "YOU ARE NOT MY WIFE"

If a man says this in answer to his wife's request for Talaaq, then the Fuqahaa have ruled it as a Talaaq coming into effect. One Talaaq will be effected even in the absence of any intention. [Qaadhi Khaan, page 397, vol.1]

SAYING, "YOU ARE SINGLE"

If a husband gives the above as a reply to the wife's request for Talaaq, then also one Talaaq will be effected, regardless of his having an intention or not. [Ibid]

SAYING, "YOU ARE MY MOTHER"

If a husband says the above to his wife, whether in a state of anger or not, then a Talaaq will **not** be effected nor is it *Zihaar*, but saying such things is a great sin. One should never ever say such things. [Fataawa Aalimgiri, page 526, vol.2]

It is stated in *Mabsoot, "If he says about his wife, 'This is my mother', ...She remains his wife."*[page 140, vol.6] Similar rulings are found in Shaami Durrul Mukhtaar, however to say such things is sinful.

Similarly, to say to the wife, *"My daughter/aunt"*, etc. also does not effect a Talaaq. [Mabsoot, page 140, vol.6]

THE HUSBAND SAYING, "I AM PREPARED/READY FOR TALAAQ"

Indication and certainty are conditions for Talaaq. **To say anything which denotes future tense with regard to Talaaq, will not effect a Talaaq, since such sentences do not give Talaaq, they are merely a promise or**

warning of pending Talaaq. Promises and warnings are not considered as Talaaq. Such sentences are useless talk. Although they do not constitute Talaaq, to say such things are not appropriate.

"Talaaq is not effected except with definite words, or proof thereof." [Badaa`i, page 2104, vol.2]
"Informing of future Talaaq, or warning of a pending Talaaq, are not considered as Talaaq, unless it is not stated in indefinite words." [Ibid]

IS SILENCE CONSIDERED AS CONSENT?

If a man is addressed in a gathering, *"Since your wife is so troublesome and disobedient, why don't you divorce her and the entire matter can be amicably resolved."* If he remains silent and does not say anything, then this silence of his will not be construed as consent and a Talaaq will **not** be effected.

Alternatively, if a woman is called and told, *"Your husband is intending to divorce you, are you pleased?"* To this she replies in the positive. The husband is sitting in that gathering and he utters not a single word, then Talaaq is **not** effected, since the right to give Talaaq or not is the prerogative of the husband alone. The interference of others plays no part in it. The silence of the husband cannever be construed as consent in this case. Details regarding this can be found in the Fiqhi Kitaabs.

SAYING REGARDING THE WIFE, "LET TALAAQ BE SO"

If someone says in anger or replies to another regarding his wife, *"Let Talaaq be so"*, then one Talaaq-e-Raj`i will be effected. He can take her back during the iddat.

SAYING TO THE WIFE, "THOUSAND TALAAQS TO YOUR SON"

If a man says the above to his wife in reply to her request for a divorce then a Talaaq will **not** be effected, because this is nonsensical talk. [Qaadhi Khaan, page 399, vol.1]

ONE SPECIFIC FORM OF TALAAQ

If a man says to his wife, *"One Talaaq, two Talaaq, Baa`in Talaaq"*, then if he intended with the third portion of his sentence (*Baa`in Talaaq*) to emphasise the separation and not a third Talaaq, then Diyaanatan his intention will be accepted, but if this case comes up in front of a court, his word will not be considered and a ruling of three Talaaqs, will be issued, and his wife will become Mughallazah. **In a court intention is not considered, only apparent conditions are.** [Fataawa Aalimgiri, page 333, vol. 1]

"TALAAQ TO INDIA"

If an Indian man says to his Pakistani wife, *"Talaaq to India / Pakistan"*, then Talaaq will **not** be effected on the wife, unless the prevailing circumstances and their discussion was not one where they were discussing Talaaq. [Fataawa Bazaaziyah, page 172, vol.1]

IF THE WIFE IS TOLD, "YOUR NIKAH WAS NOT MADE TO ME"

If a husband says this to his wife in anger or otherwise, and the matter is not so, i.e. they are in fact married, then a Talaaq will ***not*** *be effected. [Aalimgiri, page 310, vol.1]*

THINKING OF TALAAQ IN THE MIND/HEART

If a man thinks to himse0lf that he has divorced his wife or that he will most certainly divorce her in the future, then this has no effect and a Talaaq is **not** effected, as long as he does not utter anything to that effect verbally. *"Because mere intention (in the mind) in a matter/dealing is of no consequence."* [Bahrur Raa`iq, page 58, vol.3]

THINKING THAT TALAAQ WAS EFFECTED AND THEN TO SPREAD THE NEWS AMONGST THE PEOPLE

If the husband by his mere thinking considers that he has given the Talaaq, and then he goes and tells the people or his wife that he had given her Talaaq, then a Talaaq is not effected, but, if this matter comes before a court, then his thoughts will not be considered, rather his admissions will be taken into consideration and a ruling of Talaaq being effected will be issued. However, the matter (marriage) between the husband and wife will be valid and in order, *Diyaanatan*. [Al-Ashbaah Wan Nazaa`ir, page 194]

If the wife is informed from reliable sources that her husband had divorced her, then she cannot live with him as a wife. She is like the Qaadhi and has to act accordingly. The details regarding this has already passed.

A similar scenario is where a man seeks a Fatwa from a Mufti regarding his Talaaq, and before the Mufti gives his reply this man, thinking that the Talaaq has been effected, spreads this news to his family and others. The Fatwa of the Mufti happens to be to the contrary, then here also the rulings will differ, *Diyaanatan and Qadhaa`an.*

If a Mufti gives a ruling of Talaaq and when this matter is brought to the attention of a senior Mufti, and he rules to the opposite, then even though the man mentioned all over that his wife is divorced, the Talaaq will not be regarded as being effected. [Azeezul Fataawa, page 290, chapter on Talaaq]

IF THE WIFE IS TOLD, "YOU HAVE A CHOICE TO STAY WHEREVER YOU WISH"

If a husband said this to his wife, and his intention was not Talaaq, then a Talaaq will **not** be effected.

"TAKE YOUR DAUGHTER'S TALAAQ FROM ME"

If a man says the above to his wife, then too, Talaaq is **not** effected. These words do not indicate Talaaq. Similarly, if he says, "*Make Nikah with someone else*", then too, Talaaq will **not** be effected.

"MY WIFE IS LIKE MY DAUGHTER"

If a man says this to his wife in anger with the intention of Talaaq, then one Talaaq-e-Baa`in will be effected. They will only be able to remain together with a renewal of Nikah.

TELLING SOMEONE ELSE TO CONVEY TALAAQ

If a man tells someone else to tell his wife, "*a Talaaq for you*", then immediately one Talaaq is effected. There is no need for this other person to rely the message for the effecting of the Talaaq. In fact, his relaying the message is even unnecessary and the Talaaq is effected. It is stated in *Qaadhi Khaan*, "*If he tells someone else, 'Say to her (my wife), divorcee', then she is divorced immediately.*" [Page 298, vol.1]

ONE OTHER WAY OF TALAAQ-E-RAJ`I

If a man says to his wife, *"Talaaq to you, you are halaal for the pigs and haraam for me"*, then the use of such words effects a Talaaq-e-Raj`i. Ignorant people are prone to the use of such idiotic words. The Talaaq is effected with the use of such words, but to say such things is not necessary and it reeks of abuse and dishonour. If one wants to give a Talaaq, then the Shariah has specified a suitable and honourable way of doing it. To merely say, *"I divorce you"*, is sufficient. Similarly, if the husband says, *"I divorce you such that no Qaadhi can negate nor any Aalim"*, then too, one Talaaq-e-Raj`i will be effected. Allamah Shaami (rahmatullahi alaihi) states: *"It is stated in 'Khayria' that it is a Raj`i Talaaq, because the sentence, 'You are haraam for me', if it refers to present tense then it is incorrect, because she will only become haraam for him after she completes her iddat. If it refers to future tense then it will be correct and it does not negate a Raj`i Talaaq. Similarly, to say, 'I divorce you such that no Qaadhi can refute/negate nor any Aalim', is also a Talaaq-e-Raj`i."* [Page 620, vol.2]

THE RULING OF TALAAQ BY MEANS OF A LETTER OR WRITTEN WORD

Upto now we have been discussing the rulings of Talaaq which is given verbally. Speech is not necessarily a condition for the validity of Talaaq, as has been mentioned earlier. Talaaq can also be effected by means of the written word. The author of *Badaa`i Wa Sanaa`i* states, *"And similarly, speech in Talaaq is not a condition. Talaaq is effected by the written word which is clear and unambiguous, or by an indication/gesture of a dumb person which is understood. Indeed the clear written word is in place of speech."* [Page 1796, vol.2]

According to the Shariah, the written word is in the same rank as speech, even though there are times where there may be differences in the two of them. There are many other instances in the Shariah, besides Talaaq, where the written word is considered, like in business and trade. We will now discuss the rulings of the written Talaaq, and its impact according to the Shariah. It should also be remembered that the written word in Talaaq, is not always taken at face value according to the Shariah. Its consideration is at times taken at legal level and at times in real life scenarios. As has already been discussed, if a man is forced and under duress to write out a Talaaq to his wife, then in such cases where he writes it out unwillingly, the Shariah does not consider it. There are times where the written word is imperative, like where a dumb person is able to write. For such a person mere indication is insufficient. Hence, there are occasions where a written Talaaq holds importance in the Shariah. There are special chapters which appear in the Fiqh Kitaabs dealing especially with this subject.

A FEW WAYS OF ISSUING A WRITTEN TALAAQ

As has been mentioned Talaaq can be effected by means of the written word. Any type of Talaaq can be effectively carried out in the written form, whether it is Baa`in, Raj`i or Mughallazah. Nevertheless, the peculiarities of the written word differs from letter to letter. There are times where the written word is insufficient to effect Talaaq and the final ruling is based on intention. For example if a person writes a letter and he does not intend Talaaq, but the discussion or the word Talaaq comes up in context, then in such a case Talaaq will not be effected in the absence of intention. [Shaami, page 589, vol.2]

However, if Talaaq is the subject matter of the letter and it is clear that the import of the letter is regarding Talaaq, then even in the absence of intention, Talaaq will be effected. [Ibid]

There are times where Talaaq is clear and unambiguous in a letter, and it will effect a Talaaq without the need of any intention. For example, if he begins the letter with, "*I divorce you*", then in such a case, Talaaq will be effected the moment he completes writing out this sentence. [Ibid]

Yes, if he attaches a condition to the Talaaq, then the ruling changes. For example, if he writes that Talaaq will be effected the moment the letter reaches her, then in such a case, the Talaaq will only be effected if the letter reaches her. As soon as the letter reaches her a Talaaq is effected, regardless of whether she read the letter or not, because her reading it was not the condition. However, if the letter is waylaid on the way or does not reach her, then that Talaaq is not effected, because it was destroyed

before reaching her. Details of this can be found in the Fiqh Kitaabs. [Ibid]

Another scenario is if the letter reaches the father of the wife first and after reading it he throws it away. Now, in such a case, if the situation is such that the father is in full control of the affairs of his daughter and he administers all/most aspects of her life, then the Talaaq will be effected as soon as it reaches the father as well, because it will be like it reached the daughter. However, if the matter is not such that the father has full control over his daughter, then the Talaaq will not be effected, unless he hands her the letter. [Ibid]

If the father hands over the torn and tattered letter to his daughter and she is able to read and understand it, then the Talaaq will be effected. However, if she is unable to decipher the writing in the letter, and cannot make out what was written, then the Talaaq will **not** be effected. It is stated in Shaami, "*He (the father) informs her of the letter and hands the torn letter over to her. If she is able to read and understand the contents thereof, the Talaaq will be effected, otherwise not.*" [Page 589, vol.2]

If the person writes out a Talaaq or instructs someone else to write it out, then the Talaaq will be effected the moment he mentions the Talaaq, and it will be effected even though he has not yet written it. [Ibid]

If someone else writes out a Talaaq on behalf of the husband and he (the writer) reads it out to the husband, who thereafter signs it, and sends it off to the wife, then it will be considered as a Talaaq, when it reaches the wife and the husband accedes that he had written it. [Ibid]

In this case the wisdom of there being an admission from the husband is that there can at times be great and long details in the letter, where the man can be duped or fooled into accepting. Hence his intention of Talaaq is imperative.

Admission is necessary for all written words, whether the person wrote it himself or he got someone else to write it out for him. If a person denies having written the Talaaq or having any knowledge thereof, then the Talaaq will **not** be effected.

Yes, if the husband denies having written the letter and there is evidence or proof presented to the contrary, then this will be accepted and a ruling for Talaaq will be issued. The denial of the husband will, in such a case, be invalid and inconsequential. [Shaami, page 58, vol.2]

ONE WAY OF REFUTATION

The following refutation and denial will not be acceptable where the husband, after writing out a Talaaq, he says that he did not have the intention of Talaaq, and that he merely wrote it as a sample of how he is going to give Talaaq. A Talaaq will be effected. This will be applicable if the words that he wrote are clear and unambiguous. In such a case there is no need of an intention. It is stated in *Durrul Mukhtaar, "There is no need for intention in the clear written word, and his word (of denial) will not be accepted in court if he claims that it is from his experience or a trial."*

A SPECIFIC FORM OF WRITING

Besides writing on a paper, if a Talaaq is written on a slate, wall, board, or anywhere else, where it can be read

and understood, then a Talaaq will be effected. The reason being that the object of writing is for conveying a message, and this is also achieved if written on any other thing besides paper and with pen. [Shaami, page 589, vol.2]

Yes, if the writing is illegible and one cannot fathom its content, then the Talaaq will not be effected, because as mentioned earlier, such writing is not considered and Talaaq will **not** be effected. For example if he 'writes' it on water, or in sand which is illegible and incomprehensible, then it will be considered as though nothing was written. Allamah Shaami (rahmatullahi alaihi) states, *"It is incomprehensible if he 'writes' it out in the air, water or on such a thing where it is not possible to understand the content or where one is unable to read it, then in such unclear circumstances, Talaaq will **not** be effected, even if he intended it."* [Page 589, vol.2]

MAKING AN EXCEPTION WHILST WRITING

If someone writes out a Talaaq and verbally places an exception by saying, *"Insha-Allaah"*, or if he utters the word Talaaq, and writes out the exception, then in such cases will this exception be valid or not? Will a Talaaq be effected or not?

In reply to this Allamah Shaami (rahmatullahi alaihi) states that such a scene is rare and unique, and that he has never been faced with such a situation. Nevertheless, it appears that the exception in both cases will be acceptable. Hence, in both cases, the Talaaq will **not** be effected. [Shaami, page 590, vol.2]

TALAAQ TO A GHAIR MADKHOOL BEHA (wife who has not been penetrated by the husband)

Upto now whatever Masaa`il have passed were regarding that woman who has been penetrated by her husband. We will now discuss the rulings regarding the *Ghair Madkhool Beha*. This is that woman who was never penetrated by her husband since the time of their Nikah and there was also no isolation of the husband and wife since their Nikah. The rulings regarding such a woman differs to that of a woman who has been penetrated by her husband.

If a man divorces his wife with whom he had never penetrated nor was he ever alone with her since the time of their marriage, then she is only liable for ½ the specified Mehr. Similarly the rulings regarding Talaaq also differ. Such a woman can be divorced. Some people labour under the misunderstanding such a woman cannot be divorced. There are some people who treat the Talaaq of such women the same as that of a Madkhool Beha, whereas the rulings for both of them differs. A Madkhool Beha can be given one Talaaq-e-Raj`i, whereas a Ghair Madkhool Beha only gets one Talaaq-e-Baa`in. There is no need for any more Talaaqs for such a woman since one Talaaq separates her from the husband. There is no such a thing as Talaaq-e-Raj`i for a Ghair Madkhool Beha. One Talaaq will effect a Baa`in Talaaq. There can however be three Talaaqs given to such a woman. If she is given three separate Talaaqs, then all three will be effected, as will be outlined below.

THREE TALAAQS FOR A GHAIR MADKHOOL BEHA

If such a woman is given three Talaaqs at once, then all three become effective, as is clear from the text of *Durrul Mukhtaar*, page 625, vol.2

Allamah Ibn Aabideen quotes from Fathul Qadeer that it is reported from Hasan Basri (rahmatullahi alaihi) and others that three Talaaqs for a *Ghair Madkhool Beha* is effected if given at once, although this is a sinful and Bid`ah act, which is contrary to the Sunnat. [Shaami, page 635, vol.2]

From the above we see that those who aver that only one Talaaq takes effect when three are mentioned are in error and this view is contrary to the general consensus of the Ummat. We will not mention regarding *halaalah* for a *Ghair Madkhool Beha.* Many people have gone astray in their research regarding this matter. There are those 'enlightened' people of today who aver that what and why *halaalah* can there be for a woman who was not penetrated in the first place.

In the preceding chapters we have discussed in detail regarding *halaalah* and its wisdom, rules and role in Shariah. We have presented various proofs for it also. Besides the other reasons and factors of *halaalah*, one of the wisdoms underlying it is to teach the husband a lesson. It is also as a punishment for his inanity and rashness.

Allamah Shaami (rahmatullahi alaihi) states, *"Ibn Humaam has refuted it (the notion that halaalah is not necessary for a Ghair Madkhoolah Beha) in the strongest*

terms. He writes in the end of his discussion of Raj`at that the conditions for halaalah is the same for both the Madkhoolah and Ghair Madkhoolah. The Nass (Qur`aanic text) of halaalah is general. Those Kitaabs wherein it is written that there is no halaalah for a Ghair Madkhoolah have taken a false step, as they are directly opposing the Nass and Ijma. Such words should never emanate from the mouths of believers, because the utterance of such things allows for the entrance of shaitaan. These are such matters wherein there is no scope for Ijtihaad and independent viewpoints. It will be difficult for person to save himself from gross error if he makes Ijtihaad in such matters. May Allaah Ta`ala save us from such astrayness and deviation. To oppose it (Nass and Ijma) is not far from kufr." [Shaami, page 625, vol.2]

Allamah Shaami (rahmatullahi alaihi) has clearly outlined the ruling regarding the *Ghair Madkhoolah*, and he has even stated that the Fatwa of kufr can be placed on those who view this matter to the contrary.

The Nass on its own is sufficient refutation of the other view. And then further we have the Ahaadith and Ijma which also rejects this view (that there is no *halaalah* for the *Ghair Madkhoolah*). On top of all this the rational reasoning and arguments also point to the fact that *halaalah* is imperative for the *Ghair Madkhoolah* also. In also lies protection of the Deen and Shariah.

ISSUING SEPARATE TALAAQS

If a woman is *Ghair Madkhoolah* and her husband gives her different Talaaqs in different ways, then the ruling is this that the first Talaaq effected a Baa`in and the balance were nonsensical and invalid. However, if he gives three

Talaaqs in one word, like if he says, *"For you is three Talaaqs"*, then three will be effected. [Shaami, page 627, vol.2]

An example of different Talaaqs is that he says, *"You have one Talaaq, two Talaaqs, three Talaaqs."* That is, if the Talaaqs are separated by quality, conjunction, etc. [Ibid]

Similarly if the husband says, *"For you is three separate Talaaqs"*, then only one Baa`in will be effected and the balance will be nonsensical. [Ibid]

GIVING THREE TALAAQS WHILST MENTIONING THE WIFE'S NAME

If a husband of a *Ghair Madkhoolah* says to his wife, *"You are divorced, O Faatimah, thrice"*, then it will be effected. [Shaami, page 627, vol.2]

In reality, a quantity which is adjoining the thing being counted, will be considered. If there is any separation between the number and the thing being numbered, then it will not be considered. It is mentioned in *Durrul Mukhtaar, "Talaaq is effected with such a number which is adjoining the Talaaq. Talaaq will not be effected with the mere mentioning of the number."*

However, since the name of the wife is mentioned, and the name shows attribution, which is in the place of a Sareeh, so even if it separates the number from the Talaaq, a Talaaq will be effected as the Fuqahaa have not regarded this as separation in reality.

In this case a ruling of three Talaaqs will be issued. Contrary to if the husband says, *"You are divorced, people be witness, thrice"*, then only one Talaaq will be effected. In this case there is a distinct separation between the Talaaq and the number. Only one Talaaq-e-Baa`in will be effected.

DISCUSSION ON KINAAYAAT

We have until now been discussing mostly Talaaq-e-Sareeh, which is mostly effected in the course of usual Talaaq. Nevertheless, the matter regarding Kinaayah also requires elucidation, as it is an integral part of the subject matter on hand.

A FEW IMPORTANT POINTS

At the outset we wish to outline a few important points, which can be regarded as basic principles in this subject, so that the forthcoming discussion will be easily understood.

The first point is that in the case of Kinaayah, intention is of utmost importance and is considered. There may be certain cases, like where the words are clear or the prevailing circumstances indicate otherwise, where intention is not a condition for the Talaaq being effected, nevertheless, intention is the basis for Kinaayah Talaaq, as has been outlined in the Ahaadith.

Kinaayah in itself is such an occasion where the meaning or import of the statement is hidden and unspecific. The intention is imperative for this meaning to be realised and brought out. Another factor is that since Kinaayah may be ambiguous, the intention of the speaker is necessary in order to highlight the true meaning and import of the

statement, so that it may be understood what he actually meant. It is stated in *Bahrur Raa`iq*, *"Talaaq by Kinaayah is not effected except with intention or Dalaalat-e-Haal (details of which follow later on in this booklet). That is, Talaaq is not effected by Kinaayah, in a court, except with one of these two factors, because Kinaayah (on its own) is not indicative of Talaaq."* [Page 298, vol.3]

The author of *Badaa`i* states, *"There is no doubt that Talaaq is not effected by any Kinaayah words, except if there is intention."* [Page 1806, vol.4]

THE RULING OF KINAAYAH

After realising the reality of the words, then it is clear that one Talaaq-e-Baa`in comes into effect with Kinaayah. If there existed an intention of three Talaaqs, then this will be effected. The author of *Bahrur Raa`iq* states, *"In the absence of the word or indication of three, one Talaaq-e-Baa`in is effected, or three if intended. The intention for two Talaaqs is not considered."* [Page 300, vol.3]

"The crux is that in all cases of Kinaayah, an intention for three will be considered and valid. [Ibid]

The words of Kinaayah are ambiguous and have the meaning of Talaaq or something else. This is the reason why after a man uses Kinaayah words, he should be asked regarding his intention. If he intended Talaaq, then it is effected. otherwise not.

However, some words of Kinaayah, may effect a change in the ruling, where a Talaaq is effected even in the absence of any intention.

There are some words which are specific, and their use will be regarded as Kinaayah. Then there are other words, whose meaning and import are not specific (to Talaaq), then in such cases if the intention was in fact, Talaaq, it will be effected thereby. The author of *Badaa`i* states, *"However, the first type includes all those words which are used for Talaaq, and can also be used for other things, like if he says, 'You are Baa`in', 'You are haraam for me', 'Isolated woman', 'Free woman', 'Batta', 'The matter is in your hands', 'Choose', 'start counting iddat', 'Free your womb', 'you are single', 'I have opened your way', 'I have opened your knot', 'I have separated from you', 'I have freed your way', 'I have dismissed you', 'I have no hold over you', 'I have no Nikah with you', 'You are free', 'Get out!', 'Get scarce', 'Go away', 'Move away', 'Seek husbands', 'Go to your family', etc. These are Kinaayah words, since the meaning of Kinaayah in the dictionary is that word whose meaning/object is concealed from the listener. These are such word whose real meaning and import are hidden from the listener."* [Page 1803, vol.4]

The use of such words will effect a Talaaq-e-Baa`in. Nevertheless, since their true import and meanings are hidden, if the speaker claims to the contrary, then the matter becomes a complicated. The final ruling is dependant on the intention of the speaker.

EXAMPLES OF DIFFERENT POSSIBILITIES

Since there are words which can mean something other than Talaaq, therefore, it is imperative that the speaker makes clear his intention. For example, the word, *"Baa`in"* means to separate, so it could be that he means a separation in the Nikah, or a separation between good

and evil. If he means the first option, then a ruling of Talaaq will be effected, but if he has no such intention, then the second meaning will be taken. The word, "*Haraam*" could mean prohibition of benefit of Nikah, or prohibition for transacting, or eating, etc. [Badaa`i, page 1803, vol.4]

THE NECESSITY OF INTENTION

It is clearly mentioned in Badaa`i that since the meaning of the Kinaayah words are hidden, the intention of the speaker is imperative. [Page 1805, vol.4]

THE DIFFERENCE OF IMAAM SHAAFI (RAHMATULLAHI ALAIHI)

From the mentioned words of Kinaayah, Imaam Shaafi (rahmatullahi alaihi) considers three of them to mean Sareeh instead of Kinaayah. He agrees with the rest as being Kinaayah. It is stated in *Badaa`i, "There is no difference of opinion in these words, except in three. That is, his statements of, 'I have dismissed you', 'I have separated from you' and 'You are single'. Our colleagues (Ahnaaf) have mentioned that these words are from Kinaayaat, and Talaaq is not effected by them except in the case of intention, like all other Kinaayaat. Imaam Shaafi says that they are Sareeh, where there is no need for intention, like all other Sareeh words."*

THE DISCUSSION ON DALAALAT-E-HAAL (Prevailing circumstances)

In the discussion of Kinaayah, the section on *Dalaalat-e-Haal* also holds importance. Although an intention is necessary for Kinaayah, the prevailing circumstances and context also holds importance. There are many a times where the prevailing conditions take the place of intention. The meaning of *Dalaalat-e-Haal*, is that the use of Kinaayah words between husband and wife, in context of their discussion (argument), can only mean Talaaq and nothing else. The prevailing conditions would necessitate a ruling for Talaaq to be given and the refutation of the husband and his negation of any intention to the contrary will not be accepted, since the ruling is given in accordance to the apparent conditions.

The author of *Bahrur Raa`iq* states the following in explaining *Dalaalat-e-Haal*, *"Talaaq is not effected by it (Kinaayah words), except in the presence of intention or Dalaalat-e-Haal."* [Page 298, vol.3]

He states further, *"The meaning of Dalaalat-e-Haal is the apparent extenuating circumstances, which lead to the objective."* [Ibid]

It is stated in *Durrul Mukhtaar*, *"With the proof, his word will not be accepted in a court, if he negates intention, because this (Dalaalat-e-Haal) is stronger and apparent and intention is hidden."* [Page 641, vol.2]

<u>THE TYPES OF DALAALAT-E-HAAL</u>

There are three types of conditions; the first is a general moderate condition, the second is one of anger and the

third is one where Talaaq is being discussed. In the case of *Dalaalat-e-Haal*, only the second and third conditions will effect Talaaq and not the first. Since in the Kinaayah words, there may be swearing and abuse, hence in the case of anger the use of such words will not effect Talaaq. Yes, if all external factors are removed, then the ruling of Talaaq will be given. Shaami states under the discussion of Dalaalat-e-Haal, *"Anger and discussion of Talaaq."* [Page 641, vol.2]

It is stated in *Bahrur Raa`iq, "And Dalaalat applies in the case of discussion of Talaaq and anger."* [Page 311, vol.3]

DETAILS ON CONDITIONS

1. Condition of happiness (i.e. normal moderate discussion) - in such conditions, if the husband uses Kinaayah words, then his intention for Talaaq is imperative, and in the absence thereof, Talaaq will not be effected. It is stated in *Durrul Mukhtaar, "And in the condition of happiness, that is, not anger and discussion of Talaaq, the ruling will be based upon intention."* [Page 640, vol.2]

2. Condition of anger – This is the second type of condition. In the state of anger Kinaayah words are often used. A description of this type of condition is when the husband and wife are both in the state of anger and the wife says, *"Okay, why don't you chase me out?"* or she says, *"Why don't you divorce me?"* etc. In anger the husband retorts by saying, *"Get out!"* or *"Go away!"*. Then in such cases it is said that Talaaq will not be

effected, in the absence of intention thereof. The reason being that together with the possibility of Talaaq in the use of such words, there is also the strong possibility of swearing and abuse. Therefore, in the absence of any intention, it will not be possible to reach a ruling.

TALAAQ IN DISCUSSION

The third condition is during the discussion of Talaaq. If the husband and wife are discussing Talaaq, and during the discussion, the husband uses Kinaayah words of Talaaq, then here also, in the absence of intention, Talaaq will not be effected.

THE TYPES OF WORDS

After mentioning the different types of conditions, it would be appropriate to discuss the types of Kinaayah words. There are also three types of Kinaayah words. Hereunder is a table, which outlines these, and if one studies it carefully, one will note the different types of words and their respective rulings:

Type of condition	**Response / answer**	***Swear / answer***	***Only answer***
Happiness	*"Get out!"* etc Intention essential[1]	*"Single woman"*, *"Free woman!"*etc. Intention essential[2]	*"Count your iddat"*, *Free your womb"*, etc. Intention essential

Anger	Intention essential	Intention essential	Talaaq effective without intention
Discussion of Talaaq	Intention essential	Talaaq effective without intention	Talaaq effective without intention

(1). *"Get out!", "Go away!", "Go to your family!"*, etc. Such words require intention is all three conditions, as can be seen from the table.

(2). *"You are Baa`inah", "You are Haraam for me", "The choice is in your hands"*, etc. These are such words which require intention in conditions of anger and happiness, however in conditions where Talaaq is being discussed, Talaaq is effected without any intention.

<u>A DOUBT AND ITS ANSWER</u>

Here a question may arise that since the words of Kinaayah require intention for the Talaaq to take effect, how is it that certain conditions allow for Talaaq to be effected even in the absence of any intention? (As may be seen above)

The brief answer to this is that in Kinaayah, there is a possibility of Talaaq taking place and not taking place. Both possibilities are equal. The validity and invalidity of Talaaq depends upon the intention of the speaker, which will remove the doubt created by the possibilities. So it is clear that wherever the means is found to remove the

doubt from the possibilities, it is used. It is for this reason that in some cases, the circumstances of the words used will effect the ruling, because they are such that will only be used in that context, hence they will affect the ruling. These conditions now take the place of the intention. Therefore in such cases the mere usage of such words will effect a Talaaq. There is no need for any intention in such cases. The object is that if one contemplates over the situation and context of speech used, then there will remain no doubt in one's mind as to whether the Talaaq fell or not. The answer will be obvious.

<u>CLARITY ON MORE KINAAYAAT</u>

*Muhaqqiq Alaa`uddeen (rahmatullahi alaihi), the author of* Badaa`i *has expounded on more Kinaayah words. If the speaker of these words intends Talaaq, then it will be effected otherwise not. He has written under the discussion of the third type where intention is necessary,* "Similarly, if he says, 'I have gifted you to your family". Or if he says, 'I have gifted you to your father', or 'mother' or 'husbands'. *[Page 1808, vol.4]*

If the above words are used with the intention of Talaaq then it will be effected otherwise not. There are also some words which if used even with the intention of Talaaq, will not be effected, because they are such words, which are not used generally. As the author of Bahrur Raa`iq *states,* "Excluded from this is if he says, 'I have gifted you to a stranger', indeed this is not amongst Kinaayah. Brother, sister, uncle, aunt, are from amongst the strangers (as mentioned above). Talaaq is not effected even if he intends so." *[Page 301, vol.3]*

In essence, this means that if he says, "I have gifted you to your brother", *then Talaaq will not be effected even if he intended so. The Fuqahaa have not included this amongst the Kinaayah. Similarly, the words,* "I have gifted you part of your Talaaq", *will not effect a Talaaq in the absence of intention. [Bahrur Raa`iq, page 301. vol.3]*

It is stated in Mi`raaj *that the words,* "Your Talaaq is permissible for you", *and in* Zakheera, *it is stated that the words* "I gift you to yourself", *do not constitute a Talaaq. Yes, if there is intention of Talaaq, then one Talaaq-e-Baa`in will take effect.*

Similarly, the words, "You are not my wife", "I am not your husband", *etc. do not constitute a Talaaq in the absence of intention. If someone asked him,* "Is she your wife?", *and he replies in the negative, then if he intends Talaaq, it will be effected, otherwise not. After mentioning theses words, the author of* Badaa`i *states,* "If he says that he was lying, then his word will be accepted…If he says that he intended Talaaq, then it will be effected. " *[Page 1809, vol.4]*

However, if he says, "I will not make Nikah", *or* "I take an oath that you are not my wife", *then even if he has intention, Talaaq will not be effected. Like these there are a few other sentences, which when said with the intention of Talaaq, it will be invalid. The author of* Bahrur Raa`iq *states this beautifully,* "Included in this is, 'You are not my wife', I am not your husband', 'There is no Nikah between the two of us'…"

***The under-mentioned sentences will not effect a Talaaq, even if the speaker intends Talaaq,* "I have not married**

you', There is no Nikah between us', 'I have no need for you'. The use of such sentences will not effect a Talaaq, even if he intends so. " ***[Page 305, vol.3]***

THREE TALAAQS CAN ALSO BE CONSIDERED IN KINAAYAH WORDS

If there exists an intention in Kinaayah, then an intention for three Talaaqs will also be considered. In the presence of this, Talaaq-e-Mughallazah will take effect. The couple will not be able to reunite except with halaalah. *If a person intends with Kinaayah words three Baa`in Talaaqs, then it will be so. [Badaa`i Wa Sanaa`i, Page 1811, vol.4]*

In citing proof for this, he states, "The proof lies in the narration where Hadhrat Rukaana divorced his wife, Talaaq-e-Batta, when questioned by Nabi (sallallahu alaihi wasallam), he denied intending three Talaaqs. If his sentence did not include the possibility of three Talaaqs, then Nabi (sallallahu alaihi wasallam) would not have made him take an oath." *[Page 1811, vol.4]*

THREE WORDS ARE EXCLUDED

Three words are excluded from being Talaaq-e-Baa`in. They effect Talaaq-e-Raj`i. The reason being that these words are similar to Sareeh. It is also for this reason that these words will not effect three Talaaqs. Allamah Alaa`uddeen (rahmatullahi alaihi) states, "If he intends three Talaaqs with the words, 'Start your iddat,' 'Free your womb' and 'You are single', then his word will not be accepted, because these words are in the category of Sareeh." *[Page 1812, vol.4]*

RULING OF SEQUENCE OF TALAAQ

The intention of two Talaaqs in Talaaq-e-Sareeh Raj`i, or to make two verbal Talaaq-e-Raj`i, will be of no consequence. Hence, if one makes intention of two Talaaqs, when making Talaaq-e-Raj`i, it will be ineffective. Only one Talaaq will be effected. Allamah Shaami (rahmatullahi alaihi) states, " The crux is that if he intends one or two, only one will be effected." *[Page 642, vol.2]*

The husband has the right to take his wife back within the iddat period. Nevertheless, the second Talaaq will be counted for the future. Hence, if he gives his wife another Talaaq later on, then three will come into effect and she will become Mughallazah Baa`inah. A husband has the right of three Talaaqs, so if he gives one, then he has two balance. When he gives three, then his wife becomes Mughallazah Baa`inah and the couple will not be able to reunite except with halaalah.

TO GIVE THE RIGHT OF TALAAQ TO THE WIFE

The discussion on Tafweez-e-Talaaq *also holds importance and needs dilation. At the outset we had discussed the wisdom of the right of Talaaq being given to the man. Allaah Ta`ala had given this right to the man in order to save society from sin and in this system mankind is saved from many avenues of vice and sin. One needs just to see the western societies to note the instability and insecurity within, owing to the right of Talaaq being given to women. Everything has a system for smooth operation. The system of Talaaq has also been outlined and codified by Allaah Ta`ala.*

The Shariah has also allowed that the husband hand over this right of Talaaq to his wife. In this case, instead of the man, the woman may issue a Talaaq upon herself. This right is known as Tafweez-e-Talaaq. *With this* Tafweez, *the wife has just as much right to effect Talaaq as would her husband.*

ONE SPECIAL METHOD OF TAFWEEZ

There is no doubt that Islaam has bestowed women also with great and innumerable blessings and their rights are completely protected and enshrined in the Shariah. They have been removed from the clutches of the oppressors and placed on the mantle of humankind. They have been granted freedom from many oppressive customs and systems. The Shariah has kept proper consideration for women in all spheres of life and society. As far as Talaaq is concerned, although the Shariah has placed this right in the hands of the husband, nevertheless, if the situation is such that the man is very oppressive and the life of the

wife becomes very difficult and constrained, then the Shariah has made it possible that she be granted this right of divorce (by her husband) so that she may be able to extricate herself from his vile clutches, if the need ever arises. Nevertheless, this right requires that the husband pass it over to her, since it is after all his right. Yes, after he has conferred it to her, she may regulate it as she pleases. In this way, her difficulties may easily be resolved. When the husband confers this right to the wife, then the choice is removed from his hand. It is preferred that this be done in written form as is the Nikah at the time of contracting. Especially in present times, where women are faced with numerous hardships and difficulties imposed upon them by their oppressive husbands, this is a suitable option.

As long as the husband plays his part properly, their married lives will be conducted peacefully. If the Talaaq is conferred to the wife by the husband with consent and within the bounds of the Shariah, there is no harm in this and it is fully acceptable in the Shariah.

A CONDITION OF NIKAH

If at the time of contracting the Nikah, the guardians of the girl request this condition from the boy, then there will be no harm and the Nikah will be valid and completely within the bounds of the Shariah. It is stated in Durrul Mukhtaar, "If he makes Nikah with her upon this condition that the matter (of Talaaq) is in her hands, then it will be valid and correct."

However, Allamah Shaami (rahmatullahi alaihi) makes it clear that this condition must be forthcoming from the woman and the husband will accept it. If this condition

comes from the man that he will marry the woman on condition that the matter of Talaaq is in her hands, then this is baatil and invalid. In such a case, neither does the woman have the right of Talaaq, nor will it be effected if it flows from her. Nevertheless, the Nikah will be valid. [Shaami, page 667, vol.2]

A FEW IMPORTANT POINTS

There are a few points outlined by the Fuqahaa regarding Tafweez-e-Talaaq, *which need consideration. The first is that the woman must be well aware that she has been given the right of Talaaq. This is regardless whether the husband gives her this right directly, or in the form of a letter or messenger. It will be valid and binding if done in any form. It is stated in Aalimgiri,* "If she is granted the right/choice and she did not hear it or she was absent at the time, then she will be able to exercise that right from the time of her being made aware of it." *[Page 388, vol.1]*

However, if the wife rejects having knowledge of it, and the husband confirms that he has given her the right, then the statement of the wife will be considered. [Aalimgiri, page 388, vol.2]

Secondly, the woman must accept this right which is being conferred upon her in the same gathering wherein she is made aware of it. If the gathering changes or if she displays some type of rejection, then this conferment is baatil and invalid. It is stated in Bahrur Raa`iq, "If she stands up (from the place where the Tafweez was made), or gets involved in some other work, then her choice (in Talaaq) is invalid and baatil." *[Page 311, vol.3]*

It is stated in Aalimgiri, "Her choice of Talaaq is valid as long as that gathering lasts." *[Page 387, vol.1]*
By gathering here is meant the place where the husband and wife are busy discussing. Wherever the woman is at the time of her being informed, that is the place which is considered as being the gathering. The man's changing his place and his gathering is of no consequence, since the choice and consideration here is of the woman. It is stated in Aalimgiri, "Similarly, if he stands up from the place, the choice still remains with her as long as she remains in that gathering." *[Page 386, vol.1]*

Together with this, the husband also does not have this right to revert his statement, or to prevent the woman from exercising it after it has been given. [Aalimgiri, page 386, vol.1]

Thirdly, if the husband has specified a certain time period in which the wife has the choice, then she is bound to that time period. After the lapsing of the said time period, her choice falls away. [Bahrur Raa`iq, page 311, vol.3]

Allamah Ibn Aabideen (rahmatullahi alaihi) also states, "However, (her choice for) the time of one month for example, will remain as such as long as the month remains." *[Page 654, vol.2]*

Fourthly, the words used in the Tafweez must be specific and clear. The use of the word Talaaq or other such clear words must be used. It will not suffice to just say, "choice". *It must be understood at least by one of the two partners. [Fataawa Hindiya, page 388, vol.1]*

Fifthly, intention is imperative in the case of Kinaayah Tafweez-e-Talaaq. If the husband did not intend Talaaq, then a Talaaq will not be effected. "It is imperative that he has intention (of Talaaq) when he gives her the choice. If she opts Talaaq on herself, then one Talaaq-e-Baa`inah will be effected." *[Aalimgiri, page 388, vol.1]*

Sixthly, the wife only has the right of use, as much as was given to her by the husband. If she is given the choice of one Talaaq, she cannot effect two or three.

Seventhly, after giving the choice, the husband cannot revoke it nor can he cancel it. There is however, one way out, and that is, if the husband, after giving her the choice offers her an amount of money whereby she may not exercise that right, and Talaaq will not be effected. "If he gives her the choice, then he offers her something in exchange for it, and she opts for this, it (Talaaq) will not be effected." *[Bahrur Raa`iq, Page 311, vol.3]*

Nevertheless, the Fuqahaa have included such a deal as bribery [Ibid]. It will be possible to make a promise of giving the money and thereafter not giving the money, since it is regarded as a bribe.

A FEW TYPES OF TAFWEEZ

The Fuqahaa have mentioned three ways in which Tafweez *may be effected. In any one of the three ways, the woman will have the choice of Talaaq. The author of* Durrul Mukhtaar *states,* "There are three types/ways; Tafweez, taukeel (by means of a representative) and by letter."

He states further, "By Tafweez is meant, (where the husband says) 'For you is the choice of one Talaaq." *[Page 653, vol.2]*

The Fuqahaa have states three common ways of making Tafweez, "Choose (Talaaq for yourself)", "The matter is in your hands", "You have the choice".

EXPLANATION ON "CHOOSE"

We will first outline the details on the word "Choose" *as explained by the Fuqahaa. Whether this is used in any language, it will be effected and considered as long as it refers to Talaaq. For example, if a husband says to his wife,* "Choose yourself". *This is as though the husband has given his right of Talaaq to his wife. Now the wife has the right to choose divorce upon herself as long as she remains in that gathering or she may reject this choice. If she stands up and goes away, or starts talking to someone else, or does anything where she displays rejection of the choice, then her right falls away. Some types of* Tafweez *may be done by Kinaayah, this is called* Tafweez-e-Kinaayah. *This can only be effected if there is an intention of Talaaq. One Talaaq-e-Baa`in is effected hereby. It is stated in* Bahrur Raa`iq, "It is not correct or valid to intend three Talaaqs." *[Page 311, vol.3]*

*The proof as to why Talaaq-e-Baa`in is effected is stated in* Bahrur Raa`iq, "Baa`in is effected thereby, because he is giving her the choice to be removed from his responsibility and 'ownership'. This can only be effected by separation." *[Page 311, vol.3]*

Tafweez can also be effected through Sareeh words and their ruling will also follow that of Sareeh, where a Talaaq-e-Raj`i will be effected even in the absence of any

intention. Those cases where Talaaq-e-Baa`in is effected, are where the words, "Choose" *and* "the matter is in your hands" *are used.*

*Regarding Talaaq-e-Baa`in, Allamah Ibn Aabideen (rahmatullahi alaihi) states,* "Raj`i will not be effected thereby, because, it is Tafweez with Kinaayah words. Baa`in will takes effect." *[Page 657, vol.2]*

The words, "Yourself", *etc. must be used in conjunction with* "Choose". *Whether it is in the speech of the husband or the wife, the mere words,* "Choose/chosen" *will not effect a Talaaq. It is stated in Aalimgiri,* "It is stated in Muheet that it is imperative to mention the word 'self' or 'Talaaq' in any one of the two's speech, for the Talaaq to be effected. In such a way that the husband says, 'Choose yourself', or the wife says, 'I have chosen myself'." *[Page, 388, vol.1]*

The main reason for a Talaaq not being effected is that the mere word, "Choose", *does not necessarily indicate choice of Talaaq or Talaaq, as it is an incomplete and incoherent word. There is a need for some connection of the word to indicate that it refers to Talaaq.*

AN IMPORTANT WARNING

With regard to the above Mas`alah, an important point should be kept in mind, that it is imperative that either the husband or wife must have the word "self" *coupled with* "choose". *The crux is that the word* "self" *or any similar word would make the Tafweez effective. The actual word* "self" *is not in itself the only option, it is used just as an example. The main object is that the meaning of Talaaq must come out in the statement made. [Shaami, page 658, vol.2]*

Allamah Ibn Aabideen (rahmatullahi alaihi) has expounded on this subject in great detail. He has mentioned a few words and also said that if the husband intends three and tells his wife to choose and she opts for it, then three Talaaqs will be effected. [Page 659, vol.2]

A RULING

If the husband gives his wife the choice and she replies, "I have chosen my father/ mother", *whereas her parents are not present, or her brother is present, or not, the Fuqahaa have ruled that a Talaaq will be effected. The presence of her parents is not conditional for the effectiveness of Talaaq. The Talaaq is effected by the mere mentioning of the words. [Shaami page 658, vol.2]*

RAJ`I BEING EFFECTED BY "CHOOSE"

In the above stated cases, where Talaaq-e-Baa`in is effected, a Talaaq-e-Raj`i can also be effected with a slight change. If the husband couples the word "Talaaq" when he gives her the choice, for example, he says, "You have the choice of Talaaq", *then one Talaaq-e-Raj`i becomes effective if she opts for it. It is stated in* Raddul Mukhtaar, "If he tells her to choose Talaaq, and she replies, ' I have chosen Talaaq', then one Talaaq-e-Raj`i comes into effect, because since the word Talaaq is Sareeh, then Raj`i comes into effect." *[Page 653, vol.2]*

If this Sareeh is used thrice, then three Talaaqs come into effect, and the wife has the choice to administer three Talaaqs. It is stated in Fataawa Shaamia, "If he tells her 'Choose yourself', and she says, 'I have chosen myself', one Talaaq will be effective. If he adds to it and says,

'Choose for yourself, three Talaaqs', and she says, 'I have chosen it', then three will be effective." [Page 658, vol.2]

However, to have intention of three in "Choose for yourself", *will not be considered and valid, as has been mentioned earlier from* Durrul Mukhtaar, page 657, vol.2.

DISCUSSION ON "THE MATTER IS IN YOUR HANDS"

Now that the discussion on the first word of Tafweez *is complete it is necessary that we discuss a little on the second sentence, which is* "The matter is in your hands". *The ruling here is similar to that of* "Choose" *as explained above and it can also effect a Talaaq-e-Baa`in and Raj`i. Here also, the intention plays an important role as in the case of* "Choose". *The conditions which apply to* "Choose" *will also apply to* "The matter is in your hands". *[Fataawa Aalimgiri, page 390, vol.1]*

THE DIFFERENCE BETWEEN "CHOOSE" AND "THE MATTER IS IN YOUR HANDS"

As mentioned earlier both these sentences are similar in their rulings, however, the one difference is that an intention for three Talaaqs is not considered in "Choose", *whereas it is in* "The matter is in your hands". *[Bahrur Raa`iq, page 317, vol.3]*

By this is meant that when the man makes intention for three Talaaqs in his statement of "The matter is in your hands", *it is imperative that he intends also* Tafweez. *This facilitates matters for the wife, so she can effect the Talaaq upon herself if she so desires.* "By intention of

Talaaq is meant the intention of Tafweez" *[Bahrur Raa`iq, Page 317, vol.3]*

In this Mas`alah also, the intention of three Talaaqs or not is the choice of the husband.
If the husband refutes having intended three Talaaqs, and the wife had already effected three Talaaqs, then the man will be asked to take an oath to the effect that he did not intend three, and his refutation will be upheld. [Ibid]

THE REPLY OF THE WIFE

In reply to the husband's "The matter is in your hands", *it will not be sufficient or correct for the wife to reply,* "The matter is in my hands". *In this way neither does she get the choice nor can she effect Talaaq upon herself. In fact, it will be necessary for her to say in reply,* " I have chosen myself". *Her reply must have the import and meaning of Talaaq in it. [Ibid]*

"The principle is that whatever words would effect a Talaaq from the husband will effect the same from the wife." *[Ibid]*

Further to this, the author mentions a few other sentences which would constitute a suitable reply for the wife to the husband's "The matter is in your hands", "If he says 'The matter is in your hands', and she replies, 'You are Haraam for me', or 'I am Baa`in from you', or 'You are Baa`in from me', then this is a reply from her." *[Ibid]*

The crux is that whatever reply is forthcoming from the wife, as long as it has the qualities to constitute and mean clearly a Talaaq, it will be effected. Even if he hands his wife over to her father, a Talaaq will be effected. It is

stated in Bahrur Raa`iq, "If he places the matter in her father's hands, a Talaaq will be effected. Similarly, if he places her matter in her hands and she says, 'I have accepted myself', a Talaaq is effected." *[Ibid]*

"THE MATTER IS IN YOUR HANDS" IS NOT THE ONLY OPTION

The Fuqahaa have allowed for great leeway in the effecting of Talaaq by "The matter is in your hands". *Tafweez is not only effected by the usage of the words,* "The matter is in your hands". *In fact, it can easily be effected by the use of other words. It is stated in* Bahrur Raa`iq, "(The use of the word) 'Hand' is not a condition, if he says 'The matter is in your palms/right side/left side/mouth/ tongue', etc. then too it will be effected. This is stated such in 'Khulasa' and 'Bazaaziyah'." *[Ibid]*

Similar words are stated in Aalimgiri, page 391, vol.1.

THE INTENTION FOR TWO IS NOT CONSIDERED

It has been mentioned in the discussion of "Choose", *that the intention for two Talaaqs will not be considered and only one Talaaq will be effected thereby. The same will apply with* "The matter is in your hands", *where only one Talaaq-e-Baa`in will apply and the wife cannot effect more than this upon herself. Allamah Ibn Aabideen (rahmatullahi alaihi) states,* "If he intends multiple or one or two, only one Baa`inah will be effected." *[Page 663, vol.2]*

CONSIDERATION OF DALAALAT-E-HAAL

In the matter of Tafweez, *Dalaalat-e-Haal is also considered. The full details on Dalaalat-e-Haal has already been outlined, nevertheless, what we need to say*

*here is that it will apply in cases of anger and discussion of Talaaq. The woman will get the option of Talaaq in the case of Dalaalat-e-Haal even in the absence of any intention. Talaaq will be effected. Guidance on this Mas`alah can be found in* Shaami, Bahrur Raa`iq, Nahr *and other Fiqh Kitaabs.* "For Tafweez an intention is necessary diyaanatan. A ruling will be given according to Dalaalat-e-Haal in a court." *[Bahrur Raa`iq, page 317, vol.3]*

If the husband denies intention and Dalaalat-e-Haal, and the wife presents proof for intention or Dalaalat-e-Haal, then her admission will be considered and a ruling given accordingly. If she has no proof, then an oath will be extracted from him and a ruling granted accordingly. It should also be remembered that in the case of Dalaalat-e-Haal, a refutation by the husband of intention will not be considered. [Fataawa Aalimgiri, page 391, vol.1]

CONDITION OF DAY AND DATE

As mentioned previously the choice of the woman in the case of Tafweez lasts as long as she remains in the gathering where the choice was given to her. A condition of time can also be added, where the choice of the wife lasts for as long as the condition stipulates. When this time period expires then her choice also expires. It is stated in Fataawa Aalimgiri, "If he says to her, 'The matter is in your hands for a day/month/year', or he says, '…for the day/month/year', or 'This day/month/year'', then she is not limited to that gathering. She has the option of choice for the specified period of time." *[Page 393, vol.1]*

The same applies if she is given the choice for a few days. [Ibid]

HAVING A REPRESENTATIVE

The discussion on this has also passed, where the husband gives his wife the choice of Talaaq via the medium of a representative. However, that choice is limited to that gathering only and the husband has no choice of rescinding his Tafweez. *It is stated in Fataawa Aalimgiri,* "It is stated in Fataawa Sughra that if the husband says to a stranger that the matter of his wife is in his (stranger's) hands, then this choice is limited to that gathering only. The husband has no right to rescind this choice." *[Page 393, vol.1]*

THE CHOICE OF TALAAQ FOR A MINOR

In the case of Tafweez, *the rulings will apply equally for a mature woman as well as a minor girl. If the husband is mature and the wife a minor or the opposite, in all cases it will be valid and applicable. [Bahrur Raa`iq, page 318, vol.3 / Shaami, page 656, vol.2]*

The Fuqahaa have not applied any restrictions as to whether the minor is close to maturity or not.

DISCUSSION ON THE OPTION OF TALAAQ

We will now discuss the third way of effecting Tafweez, *that is, giving the wife the choice of Talaaq. This third type is slightly different to the previous two, but there are common traits amongst them, like it being restricted to the gathering, the husband not having the right to rescind, etc. The author of* Bahrur Raa`iq *states*, "The husband does not have the right to rescind from the Tafweez, whether it is with the use of the word, 'Choose', 'The matter is in your hands or 'Divorce yourself'." *[Page 327, vol3]*

THE RULING OF THE USE OF "WHEN"

There are some words which will negate the restriction of the gathering. For example if the husband says, "Divorce yourself, when you wish", *instead of saying* "...if you wish". *Since the word,* "When" *is open and does not denote any specific time, then the choice of the wife to effect Talaaq upon herself is open. It is stated in* Bahrur Raa`iq, "If he adds, 'when you wish', then she has the choice of Talaaq in another gathering as well, because the word, ' when' is general and not restrictive." *[Page 328, vol.3]*

This applies to any such word which is similar in meaning and import to "when".

ONE WAY OF ATTACHING A CONDITION

There are other ways where the restriction of the gathering is negated and the wife has the option of exercising her right of Talaaq at a later stage. For example, if the husband says to her, "Give a Talaaq before you finish eating your food." *Then the woman has a choice of effecting Talaaq, until she completes eating her food. There is no restriction on the gathering. It is stated in* Fataawa Shaamia, "Contrary to when any condition is attached (to the Tafweez), like her eating. This will not restrict it to the gathering which she is in." *[Page 669, vol.2]*

SPECIFYING THE WORD 'TALAAQ' TO THE OPTION

*If the husband specifies the word 'Talaaq' when he gives her the option, and the wife effects the Talaaq upon herself, then regardless of whether the husband had intention or not or whether he intended one or two, only one Talaaq-e-Raj`i will be effected. There is no escape from this. In this case also, the intention of two will not be considered and only one will take effect. [*Raddul Mukhtaar, page 668, vol.2]

If the husband makes clear his intention of giving her the right of three Talaaqs, then she has the option of effecting three Talaaqs upon herself. This will apply whether he gives her the option in one sentence or in different sentences. [Ibid]

In those instances where the option which is given to the wife is limited to the gathering, then she has the option of effecting Talaaq upon herself in that gathering, failing which this right no longer remains with her. [Shaami, page 669, vol.2]

GENERAL CONSENT

In this discussion there remains one more thing which needs to be mentioned. That is, if the husband gives his wife the choice of three Talaaqs, then can she effect only one or two and not necessarily all three at once? There is a difference of opinion amongst the Fuqahaa regarding this matter. The preferred view is that since she has the right to effect three Talaaqs, then all the more she must be able to effect only one or two. The fact that she has the option indicates to this view. The general consent grants her the right to choose the option she desires. Allamah Ibn Aabideen (rahmatullahi alaihi) states from Bahrur Raa`iq, "It is stated in Bahr that there is no difference between one or two" *[Page 670, vol.2]*

He states further, quoting from Fathul Qadeer, "It is stated in Fath that since she has the ownership (choice) of three, she then has the choice to effect from there whatever she pleases, like the husband has right." *[Page 670. vol.2]*

"Ramalee has mentioned that this Mas`alah necessitates that if he says to her, 'divorce yourself', and he intends three, and she divorces with two, then only two will be effected." *[Shaami, Page 670, vol.2]*

TYPES OF OPTIONS

The Fuqahaa have mentioned a few other words which also have the same effect as giving the wife the option to choose. Therefore, if the husband says, "divorce yourself if you intend", ..."are happy to do so", *etc. then it will have the same effect as his saying,* "...if you wish". *The*

wife will then have the option to choose Talaaq on herself in that very gathering. [Shaami, page 669, vol.2]

ANOTHER WAY OF TAFWEEZ

The other method of effecting Tafweez *is by means of representation. The husband instead of relaying the choice of Talaaq to his wife himself does so by using another person as a medium. In this way, the wife receives the choice to Talaaq herself through the medium of a third person. A representative is in the stead of the actual person who had given him the right of representation. The Shariah accepts this representation in many dealings.*

There remains one point which needs dilation. After a man makes someone his representative to go and convey the choice of Talaaq to his wife, does he (the husband) have the right to rescind this choice? Although there exists a difference of opinion amongst the Fuqahaa on this point, the preferred view is that he has the choice. The author of Durrul Mukhtaar *has dilated in detail on this point, and in conclusion he states that in representation the husband can rescind his choice. [Page 656, vol.2]*

From here we understand that in ownership of Talaaq, there cannot be any retracting, but in the case of the representation, there is some leeway. However, once the wife has already been given the choice directly by the husband, and she has been given the right of Talaaq, then the husband cannot rescind or retract his choice which he

had given her. Now, she has full right to do as she desires in the matter.

TAFWEEZ BY MEANS OF A LETTER

The husband may also make Tafweez by means of a letter. As soon as the letter reaches the wife or she receives reliable information about it then she has the choice. With regard to a letter also, the usual consideration of accepting in the gathering etc. will also hold.

DIFFERENT WAYS OF NEGATING THE CHOICE

After discussing the ways in which the wife receives the right to effect Talaaq, we will now consider the ways whereby this right is taken away from her. Amongst the various ways which the Fuqahaa have stated, we will dilate briefly on the choice which holds for the specific gathering. A little on this has been mentioned previously, but no mention was made as to the limits of a gathering. The Fuqahaa have stated that at the completion of the discussion (where the choice was given to the wife) between the husband and wife, until they move away from there will be regarded as the same gathering. Regardless of whether this lasts for an hour or an entire day. Now, in this time, the wife has the right to either accept this choice or to reject it. If the gathering changes (i.e. the woman goes away from that place) or she displays a disinterest in the matter, then her choice is negated. As far as the changing of the gathering is concerned there is a difference of opinion amongst the Fuqahaa.

Some have opined that her mere standing up from where she is sitting would constitute a negation of her choice, whereas others have said that her going away from there denotes a negation. The preferred and correct view is that her choice will be negated if she displays an aversion and disinterest in it, either by standing up, going away or even whilst sitting there. [Shaami page 654, vol.2]

From this we understand that mere standing up will not constitute a negation of the choice, rather if she stands up displaying some sort of rejection to the choice. It will be clear that if the wife stands up to carry out an act which would facilitate and aid her acceptance of the choice, like if she gets up to go and bring witnesses, then her choice is still valid and operational. [Shaami, page 654, vol.2]

However, her speaking to a stranger will be considered as a negation of the choice [Shaami, page 654, vol.2]

The above negation of the choice will be applicable if the husband did not make any exception or specify a limit to the choice. However, if the husband had stipulated a time period for her to make the choice, like that day, week, month, year, etc. then her choice will not be negated except with the coming of the specified time. If she stands up and speaks to a stranger or moves away from that gathering then her choice is not negated. For example if the husband specifies a month for her choice, then her choice in the matter will last for the entire month, regardless of what she does in the interim. Naturally, at the termination of the month, her choice will expire by itself. [Shaami, page 654, vol.2] [Fataawa Aalimgiri, page 387, vol.1]

By gathering is meant only the gathering of the wife. If the husband stands up and moves away, then it has no impact on the choice of the wife. Only the movement and reaction of the wife is considered in this case. The negation of the choice is dependant purely on the reaction of the wife. If the husband moves away, her choice still remains as long as she is still in that gathering. [Aalimgiri, page 387, vol.1]

We will now loom at all the other ways in which the choice of the wife is invalidated. In this regard we will quote from Fataawa Aalimgiri, where all the other ways are listed, "If she stands up from the gathering before choosing herself (i.e. effecting Talaaq), if she occupies herself in some other duty/work which has no relation to the matter on hand, like she starts eating, or sleeping, or combing her hair, or bathing or applying mendhi, or they have intercourse, or she starts speaking to someone else to engage in buying or selling. All these actions would negate her choice. This is stated in Siraajul Wahaaj." *[Page 387, vol.1]*

If she has to engage in slight eating or drinking, perhaps to counter her surprise/shock, then the Fuqahaa have overlooked this and regarded it not to affect her choice. Or if she was sitting and whilst sitting she falls off to sleep, changes her clothing whist sitting, or engages in some small work wherever she is, which does not indicate her disinterest in the matter on hand, then her choice still remains. This is clearly stated in Aalimgiri, page 387, vol.1]

If a woman was standing when she was given the choice, and thereafter she mounted a conveyance, or vice versa,

then her choice is negated. Or if she was mounted on one conveyance and after receiving the choice, she transfers to another conveyance, her choice is invalidated.

A Mas`alah

There is one occurrence which takes place many a times wherein many ignorant people are mistaken. This is, where the parents/guardians of the wife seek a Talaaq for the woman from the husband. In reply, the husband says, "Whatever you desire from me, do it", *then the father (guardian) effects a Talaaq for his daughter whereafter she is later married to someone else. In such cases, neither is the Talaaq nor her new Nikah valid. She will be living in a constant state of adultery. In such instances neither does the husband make Tafweez nor is the Talaaq valid. However, if the husband did in fact intend Tafweez-e-Talaaq in his statement, then the father effecting a Talaaq will be valid. The statement of the husband with regard to his intention will be considered. This is explained such in Fataawa Aalimgiri, page 407, vol.1.*

CHAPTER ON RAJ`AT (taking the wife back)

Upon completion of most of the discussion on Talaaq, we will now dilate regarding the subject of Raj`at. These Masaa`il also hold great significance and importance in the matter of Talaaq.

Talaaq-e-Raj`i is regarded as the lightest form of Talaaq. It is not such a Talaaq which completely severs the bond of wedlock. Nevertheless, this easiness and grace also expires within a specific time period. The time frame is long enough for the couple to contemplate over their actions and perhaps effect a reconciliation. If they do not reach any compromise in this period then the choice of Raj`at expires. This time lasts for the duration of the iddat of the wife, which is three menstrual periods, (if she still menstruates) or three months. After expiry of this time, the choice of Raj`at also expires and the wife becomes Baa`inah.

One Talaaq-e-Raj`i which is regarded as Talaaq-e-Ahsan, does not sever the marital union completely and the husband can take his wife back during the iddat period without renewal of the Nikah. The benefits and wisdom underlying this type of Talaaq has already been explained and highlighted previously.

ONE CONDITION

Before explaining any details regarding Raj`at, we wish to outline some conditions to it, which have also been mentioned by the Fuqahaa. The crux of the matter is that if Raj`at is found then the choice of taking the wife back exists for the husband, otherwise, as many different types of Talaaq as there are, there is no choice of Raj`at.
It is stated in Durrul Mukhtaar, "As long as he did not give her Talaaq-e-Baa`in. If he has given her Baa`in, then there is choice for him (to take her back)."

In explaining this, the author of Raddul Mukhtaar states, "These are the conditions for Raj`at. There are five conditions, which will are known by contemplation." *[Page 730, vol.2]*

This is further explained in Mabsoot, "If the wife is Baa`inah and she is passing her iddat, or she has made Khula, or due to Li`aan, or she has chosen herself 'by her own hands' (i.e. Tafweez), or similar, then there is no choice of Raj`at (for the husband)."

IDDAT

It has been mentioned earlier that the choice of taking the wife back lasts only for the iddat period. At the expiry of this time, the Raj`at also expires. Thereafter, if the couple wish to reunite, they can only do so after a renewal of the Nikah. [Bahrur Raa`iq, page 50, vol.4]

There is one point which has to be remembered and that is that Raj`at is only valid if the couple had had intercourse. Mere isolation of the couple after Nikah is not valid for Raj`at. There has to have been penetration.

by the husband would only effect a Baa`in and not Raj`at. [Shaami]

Allamah Shaami (rahmatullahi alaihi) explains further that even if the isolation included, "...touching her and looking at her with desire, even at her private part." *[Page 728, vol.2]*
There is a difference in the rulings of iddat and Raj`at. Iddat becomes Waajib even if there was isolation of the couple, however, for Raj`at to be effected there has to penetration. [Shaami page 731, vol.2]

FORCE AND DURESS IN RAJ`AT

Raj`at can be effected even if there is force and duress. The happiness of the wife is also not a necessary factor.* "Raj`at is effected with force, joke, play and mistake, like Nikah. This is stated in Badaa`i." *[Bahrur Raa`iq, page 50, vol.4]

VERBAL RAJ`AT

The Fuqahaa have listed two ways of effecting a Raj`at, one by speech and the other by action. It is Mustahab and preferable to make Raj`at by speech, rather than action. [Shaami, page 7298, vol.2]

*There are numerous ways of effecting Raj`at by speech. The husband can say,* "I have made Raj`at", "I have retained you", "I have taken you back", *etc. In any of these ways the Raj`at is effected, whether he intends or not. This will be done when the wife is in front of the husband and he is speaking to her without any intermediary. Raj`at can also be effected if the wife is not present, however, in such a case it is best to have two witnesses present. This is done so that when the time*

*arrives for the Raj`at to be presented to the wife or it comes up in a court, then he has the proof that he made Raj`at before the specified time and the wife or her guardians cannot claim that he had not made the Raj`at before the expiry of the iddat. Allamah Ibn Aabideen (rahmatullahi alaihi) stated,* " 'I have taken you back', it (the Raj`at) is effected at the time of the statement. Or if he says, 'I have retained my wife' in her absence," *[Page 728, vol.2]* "I have taken her back', without intention (Raj`at will be effected) because these words are Sareeh." *[Durrul Mukhtaar]*

Allamah Shaami says that it is best that he makes Raj`at by word of mouth. [Ibid]

RAJ`AT BY ACTION

As has just been mentioned, Raj`at by speech is preferable to action. The Fuqahaa have even considered Raj`at by action as Makrooh, as stated in Durrul Mukhtaar. *There are various ways of effecting Raj`at by action,* "It is clear that it is Tanzihi" *[Page 728, vol.2]*

In all the ways listed hereunder whereby Raj`at is effected, the Fuqahaa have placed the condition of there being lust/desire on the part of either the husband or wife. If there is no desire than Raj`at is not effected; to touch the wife, have intercourse, penetration in the anus (which is Haraam), kissing, which includes, the face, forehead, lips and head, at the time of any interaction with the wife, if her clothes are on he body, then this does not invalidate the Raj`at, but desire and lust is necessary. For the husband to look at his wife's vagina with desire, will also constitute a valid Raj`at. It is stated in Fataawa Qeeniyah, "Penetration in her anus is not a Raj`at, but the Fatwa is

that it will be counted as Raj`at." "It will be considered as a Raj`at if he looks at her vagina with desire and with the intention of Raj`at." *[Page 99]*

However, Allamah Shaami (rahmatullahi alaihi) has stipulated that the husband must look at the internal of the vagina for it to be a Raj`at. [Page 729, vol.2]
According to Qeeniyah *mere looking at the vagina with desire will constitute a valid Raj`at, and this is more a suitable view. Allamah Ibn Aabideen outlines the various forms and places of kissing which will constitute a valid Raj`at,* "Kissing with desire upon the mouth, cheeks, chin, forehead or head. And also touching her with or without any intervening cloth, in such a way where the heat of the body is felt with desire." *[Page 722, vol.2]*

THE LUST/DESIRE OF THE HUSBAND IS NOT A CONDITION

As mentioned earlier, there has to be desire/lust to effect a valid Raj`at. [Shaami, page 729, vol.2]

Here it should be remembered that not only is the desire/lust of the husband considered. Even that of the wife (alone) is acceptable and will validate a Raj`at, on the condition that the husband accedes to her being in a lustful state. [Shaami, page 729, vol.2]

One should remember another point, and that is that it is Makrooh for the husband to kiss or touch his wife without any desire of Raj`at. This is clearly stated in Muheet. *[Shaami, page 729, vol.2]*

THE RULING OF EFFECTING RAJ`AT IN ONE'S SLEEP

Raj`at can also be effected in one's sleep. The Fuqahaa have stated that all the ways which were mentioned earlier that effect Raj`at, will be equally applicable if the husband or wife is awake or asleep. It will apply if either one of them is asleep. It is stated in Fataawa Anqarwiyah, "If the wife cohabits with the husband whilst he is asleep, or his sanity is not intact, then it will be considered as Raj`at." *[Page 87, vol.1]*

From the above it is clear that the actions which validate Raj`at are not necessarily restricted to the husband. Even if the wife touches, kisses, cohabits with the husband, with desire, then a Raj`at will be effected. However, in these cases the husband must accede and acknowledge her lust, otherwise a Raj`at will not be effected. [Shaami, page 729, vol.2]

This is also clearly stated in Mabsoot, *page 22, vol.6]*

THE BEST WAY OF RAJ`AT

The Raj`at can only be effected during the iddat period. After the expiry of the iddat, the ruling will change. Since the duration and matter of iddat is in the hands and knowledge of the woman, the Fuqahaa have stated that it is best and Mustahab for the husband to have two witnesses to the effect that he had made Raj`at. This is done so that the wife cannot later claim that her husband did not make Raj`at. In fact the Fuqahaa have stated that to have witnesses for a Raj`at is Sunnat and not to have, is contrary to the Sunnat. This is clearly stated so in Sharhe Tahaawi. *[Shaami, page 731, vol.2]*

Allamah Shaami (rahmatullahi alaihi) has also stated that if Raj`at is effected by action, then it is best to make

another (verbal) Raj`at where two witnesses are present. [Shaami, page 731, vol.2]

It is stated in Mabsoot, "The best is that two witnesses testify (to a verbal Raj`at) thereafter (i.e. after he makes a Raj`at by action)." *[Page 21, vol.6]*

CONSIDERATION OF THE WIFE'S CLAIM

The Fuqahaa have placed consideration on the claim of the wife in the matter of expiry of iddat, since she is best aware of it. Nevertheless, they have placed a restriction of two months. That is, if the woman claims that her iddat is over before two months have lapsed, then her claim will not be considered. If however, after two months have lapsed, she claims that her iddat is over, provided she is a woman who menstruates, then her claim will be accepted. The reason for this two months restriction is that according to the Ahnaaf, a woman cannot have three Haidh within two months. It is stated in Bahrur Raa`iq, "The claim of the woman with regard to expiry of iddat is considered. However, her claim will not be accepted if it is within two months." *[Page 50, vol.4]*

Another point worth mentioning with regard to Raj`at is that the happiness of the wife is not a condition for the validity of Raj`at. Raj`at will be effected even if it is done by force and unwillingness of the wife. [Bahrur Raa`iq, page 50, vol.4]

If after the completion of the iddat the husband claims that he had already made Raj`at during the iddat period, and if the wife acknowledge to this, then it will be valid

and accepted, otherwise not. [Fataawa Anqarwiyah, page 87, vol.1]

The right of Raj`at remains even if the wife had completed her third Haidh, but had not yet taken a bath, on condition that she bled for less than ten days. Otherwise, if she bled for ten days, then the right of Raj`at expires when the bleeding stops, whether she had taken a bath or not. [Mabsoot, page 23, vol.6]

MISCARRIAGE ALSO INVALIDATES RAJ`AT

As far as Raj`at is concerned, it should be understood that it is attached to iddat, and iddat is not only dependant on Haidh. There are other factors which effect the completion of iddat other than Haidh. All these will also be considered in the matter of Raj`at, since the expiry of iddat heralds the expiry of choice of Raj`at. A miscarriage, whether it is self-inflicted or happens naturally, will effect an end to iddat. This will also mean an end for Raj`at. As explained by the author of Bahrur Raa`iq, "If the foetus is aborted, whether it is a complete body or partly-formed, the right of Raj`at expires, because the iddat expires." *[Page 50, vol.4]*

DISCUSSION ON A COMPLETELY FORMED FOETUS AND A PARTLY-FORMED ONE

At this juncture it will be appropriate that we discuss the issue of a fully formed foetus and a partly-formed one, since there are few types of pregnancies which will affect iddat and not all. That pregnancy will be considered in terminating an iddat where the foetus has limbs which can be recognisable. Even if these limbs are incomplete, but they are easily recognisable. This is effected in

nothing less than four months of pregnancy. If the foetus is less than this, then it will not terminate the iddat. This is explained by Allamah Shaami (rahmatullahi alaihi), "That pregnancy is considered where the entire body is discernable or part of it. If nothing of the foetus is discernable, the iddat will not be terminated." *[Page 531, vol.2]*

He states further, "Indeed it is not discernable except after 120 days."

"Indeed some part of the foetus is recognisable after 4 months and the complete body after six months." *[Page 831, vol.2]*

This is the reason why the Fuqahaa have not considered a pregnancy of less than four months as being a pregnancy (which will affect iddat). Such a pregnancy will not affect any ruling. In fact, this will only be regarded as a clot of blood, and nothing more.

THE DISCUSSION ON IDDAT

After discussing a little on Raj`at, we will now dilate on the laws of iddat, since it has an important bearing on the subject matter of Talaaq. Awareness of the laws of iddat are just as important as knowing the laws of Talaaq itself, since these two are inextricably linked. Not knowing the laws of iddat can lead to endless problems in matters of Talaaq. Although this is a matter for women, it is important that men also familiarise themselves with its laws.

THE PHILOSOPHY OF IDDAT

After contemplating over the matter of Talaaq, one will recognise that the Shariah has not left woman to the elements after a Talaaq takes place. It has outlined an entire set of rules whereby a woman may take support and have her due rights given to her, with honour and dignity. Men have been instructed that they do not eject the wife immediately after Talaaq, rather she has to be kept in the home and maintained for the period of iddat. The husband has to see to the well-being of his wife during the iddat period and grant her, the due rights and even if possible a little bit more. This (iddat) is the instruction of the Shariah, whether the Talaaq was effected in a proper way or in an improper way. Iddat are of different types, hence the husband will spend on her accordingly. If a woman was divorced before the couple had intercourse, that is, immediately after the Nikah, then she should get ½ Mehr amount. If the Mehr was not stipulated, then she should get "Mata`a". *Although there is a difference of opinion on what* Mata`a *amount is, the preferred view is that the husband give the divorced wife*

that much with which she is happy. There is no specified amount from the Shariah.

Another benefit of iddat is that if the husband issued the Talaaq in anger or haste and he later regrets his actions, then if he gave one or two Raj`i Talaaqs, he has the option of taking his wife back. Even if he gave a Baa`in Talaaq, then during the iddat period the couple can reconsider their pasts and perhaps reconcile and renew their Nikah. Had it not been for this period of grace, which is the iddat, then there would be no recourse for the couple. Allaah Ta`ala is most Kind and Graceful.

Another wisdom underlying iddat is that it is a means of safeguarding a lineage. Had it not been for this, then there would be mix-ups insofar as progeny and children are concerned. The Shariah has provided a precautionary way of safeguarding the progeny. Another word will be "Istibra-ur-Rahm" *(cleansing out the womb). This benefit and wisdom has a great and long lasting effect on society as a whole.*

IDDAT IN THE LIGHT OF THE QUR`AAN AND AHAADITH

Allaah Ta`ala says in the Qur`aan Majeed, "The divorced women shall wait for three menstrual periods,… and their husbands have the first right to take them back in that period." *In this Aayat the decree is that the iddat is for three Haidhs. Further, Allaah Ta`ala says,* "And when you have divorced any woman and she has fulfilled the term of her iddat, then withhold her with goodness (on reasonable basis) or set her free with goodness. But do not take them back to hurt them, and whoever does that, then he has wronged himself."

If a woman's husband passes away then she has to spend four months and ten days in Iddat, or if she is pregnant, then until she gives birth.

" And those of you who die and leave wives behind them, the wives shall wait for four months and ten days, then when they have fulfilled their term, there is no sin on you if they dispose of themselves in a just and honourable manner (i.e. they remarry). And Allaah is well acquainted with what you do."

The Qur`aan Majeed has clearly defined the limits of iddat, and it has kept the well being of the woman and their future in consideration. Even if there is Ruju`, then the Shariah has stipulated that the woman be kept well and not under any difficulty. If the marriage has to break down, then the Shariah has kept in consideration the rights for her future as well. Islaam has kept great consideration for the well-being and rights of women. No other religion can boast the same or better. The Qur`aan Majeed has also considered the matter of maintenance after the divorce. It is stated, "And for divorced women, maintenance should be provided on a reasonable basis. This is the duty of the pious believers."

With regard to Mehr, the Qur`aan Majeed states, "And give to the women their Mehr with a good heart."

THE IDDAT OF A MENSTRUATING WOMAN

If a man has given such a woman Talaaq who still menstruates, then her iddat lasts for three Haidhs. She cannot marry another man until the expiry of this period. The only possibility of Nikah during this period, is if her

husband only gave her one or two Talaaqs, then he can take her back (if Talaaq-e-Raj`i) or renew Nikah (if Talaaq-e-Baa`in). This is the best option.

THE RULING OF THE LIMITS OF HAIDH

The Fuqahaa have written that if a nine year old girl bleeds (from the womb), then if this bleeding lasts for three days (or more) then it will be regarded as Haidh. [Shaami, page 207, vol.1]

A girl younger than nine years cannot get Haidh. Nevertheless, a girl from the age of nine until a woman to the age of fifty-five (55) years of age are considered as menstruating women.

THE RULING OF IDDAT AFTER ISOLATION

If after the Nikah, the husband and wife had intercourse or they were in isolation (such that they were alone and unrestrained in any way), then such a woman, if divorced will have to pass the full iddat. [Fataawa Aalimgiri, page 157, vol.2]

IDDAT AFTER A FAASID NIKAH

If after a Faasid Nikah, there was no intercourse, but there was isolation, the woman will not have to pass iddat.

IDDAT AFTER ADULTERY

There is no iddat for an adulteress. This is stated so in Fataawa Zaheeriya and Sharah Tahaawi. [Fataawa Hindiya, page 157, vol.2]

IDDAT OF TALAAQ GIVEN DURING HAIDH

If the husband gave his wife Talaaq whilst she was in Haidh, then although this is a sinful and distasteful act, nevertheless, this Haidh will not be counted in the iddat. She will have to count the next three Haidhs. [Aalimgiri, page 158, vol.2]

A RARE OCCURRENCE AND ITS SOLUTION

There is one rare and unique occurrence which sometimes may take place. If a menstruating women's bleeding stops at the age of 20-25 years, and she does not anymore get Haidh, then in such a case, if such a woman is divorced, her iddat cannot be counted in months, because the Fuqahaa have clearly stated that a woman under the age of fifty-five cannot count iddat in months, since there is always a possibility that her Haidh can begin. After the age of fifty-five the bleeding almost always ceases, so such a woman may count her iddat as three months. It is stated in Shaami, *"Until she attains the age of menopause, she cannot count her iddat in months. The limit of menopause is fifty-five years of age. This is the preferred view."* [Page 658, vol.2]

It is stated in Durrul Mukhtaar, *"If her purity continues, then her iddat lasts until she reaches the age of menopause."* Shaami adds to this, *"When she reaches the age of menopause, then she will count her iddat in months."* [Page 656, vol.2]

It is stated in Aalimgiri, *"If she intends three Haidhs, and then her bleeding ceases, her iddat will be counted in Haidh, even if it stretches until the age of menopause."*

The question now arises that is it possible for this woman to wait that long, and not get married and to continue with the restrictions and laws of iddat?

This humble servant of Allaah Ta`ala has come to the following conclusion after considering a few pointers, that such a woman need only wait for six months. If her Haidh still does not come after that, then she must count in months and after three months she is free from iddat. The Fuqahaa have stated that the woman who reaches menopause, must wait for a further six months as a precautionary measure. [Shaami, page 658, vol.2]

Another factor is that if a woman reaches the age of 30, and her bleeding ceases, then the Fuqahaa have given the ruling that she count her iddat in months, thereafter she is free from iddat. Whereas this is such an age where there is a possibility of her bleeding resuming. [Ibid]

Another supportive factor is that if a husband goes missing, then the ruling of the Ahnaaf Ulama is that she wait for 90 years and some say for the lifetime. Whereas the latter Ulama have given the ruling in accordance to that of the Maaliki Math-hab.

Hence, in the case of the woman's bleeding having ceased, a simpler and easier alternative has to be found for them, due to their case being one of dire need.

THE IDDAT OF A PREGNANT WOMAN

The iddat of a pregnant woman is until she gives birth. Before this she cannot remarry (except her husband). This ruling applies even if the period lasts a full nine months or

if it ends in a few hours or minutes, even. [Aalimgiri, page 158, vol.2]

The end of the pregnancy is that it occurs after at least four months (since conception). That is, when some part of the body/limbs of the foetus is discernable. If a woman aborts after 4 months then too her iddat is complete. If she aborts before four months, then it is not regarded as end of pregnancy, and her iddat does not expire. [Shaami, page 755, vol.2]

There is no specified time for the ending of the pregnancy, it can occur a few minutes or days after the Talaaq, and the women is free. [Aalimgiri, page 159, vol.2]

MISCELLANEOUS

It is haraam for a woman to marry anyone besides her husband during the period of iddat. Let alone marriage, the Fuqahaa have also stated as haraam to propose to a woman who is in iddat. However, the husband, who had given the Talaaq, has the right to marry her during the iddat if the Talaaq was a Baa`in and he can take her back without Nikah if the Talaaq was a Raj`i. [Aalimgiri, page 161, vol.2]

If the wife is sane and mature, then after the husband gives her Talaaq, it is not permissible for her to leave the home of the husband, regardless of whether he gave one, two or three Talaaqs. [Aalimgiri, page 162, vol.2]

The wife should spend her iddat in the home where her husband gave her the Talaaq (i.e. the marital home). If her

safety and chastity are at stake there, then she may spend it elsewhere where there is safety.

The woman should not go to her parent's home to spend the iddat. However, if she was at their home when he issued the Talaaq, or when he passed away, then she may spend her iddat there. [Durrul Mukhtaar]

Similarly, if the husband gave his wife Talaaq whilst on journey or he passed away, then if the place where she is, is a safe one and she is able to easily spend her iddat there, then she should do so. Otherwise she should return to her marital home for her iddat. In the present times, this second option is the better one. [Shaami]

It is also necessary for an immature girl, with whom the husband had isolation, to spend iddat. [Raddul Mukhtaar]

MAS`ALAH:

If a husband gave his wife a verbal Talaaq, but the wife was unaware of it. She only comes to know of it after a few days, either by his informing her by letter thereof, or in another way. Her iddat will be regarded as having begun the day he uttered the verbal Talaaq. [Shaami]

RULINGS REGARDING TALAAQ-E-MUALLIQ (suspended Talaaq)

A condition for the effecting of Talaaq is that there must be attribution. That is, the Talaaq must be attributed or ascribed to someone (i.e. one's wife). This discussion has already passed. Similarly, if the Talaaq is issued with any adjoining condition, be it written or verbal, then it will be effected at the occurrence or completion of the said condition. We will mention a few Masaa`il hereunder. For example, if a man says to his wife, *"If your child is born in your mother's house, then you have one Talaaq."* And then she gives birth in her mother's house, in such a case one Talaaq-e-Raj`i is effected. It is stated in Aalimgiri, *"If he combines it with a condition, then the Talaaq will be effected after the condition is found."* [Page 440, vol.1]

THE RULING OF A DOUBT IN THE SUSPENSION / CONDITION

Since a Talaaq is not effected if a doubt is found, then similarly, it will not be effected if there is a doubt in the condition placed thereupon, and there will be no Talaaq. Regardless of whether the doubt appears in the generality or specifics of the conditions, or in place or time, in all cases it will not be effected. [Durrul Mukhtaar, page 623, vol.2]

THE RULING OF FUTURE TENSE

If the husband says, *"If you do a certain work, then I will give you a Talaaq."* If the wife, then goes and carries out this specific task, then the Talaaq will **not** be effected, since the condition was *"I will give you a Talaaq" (future tense).* This is a warning or promise of Talaaq and an actual issue of Talaaq. [Durrul Mukhtaar]

Mas`alah:
If the husband says, "*You must come with me otherwise I give you a Talaaq.*" Then if the wife does not go with the husband, a Talaaq will be effected, because, the condition of *otherwise* comes into effect when she did not go with him.

THE REFUTATION OF THE HUSBAND

If the husband makes a conditional Talaaq, and later he refutes it, like if he says to his wife, "*If you eat for the three days then you have a Talaaq,*" and the wife eats for three days, but later the husband refutes and denies that he made this condition, then in the absence of any witnesses, the ruling of Talaaq will not be given, even though the wife claims that he did make this condition. [Shaami, page 690, vol.2]

However, if the wife is certain that he did in fact give the Talaaq or make the condition, then she has to necessarily avoid him. If she cannot avoid him altogether, after trying her best, then the sin of this will be on the husband.

TO HAVE THE SUSPENSION/CONDITION IN THE HEART

If a man gives a verbal Talaaq, and he makes a condition in his heart, then a ruling will be given on the apparent, i.e. Talaaq is effected, since the intention and condition of the heart is hidden. [Durrul Mukhtaar]

With regard to a conditional Talaaq, it must be remembered that if the condition is not found, then the Talaaq will never be effected. That is, it will remain in perpetual suspension.

UNSPECIFIED CONDITION

If a man makes an unspecified condition, for example, he says to another woman, *"If I do not get you to Delhi, then my wife has three Talaaqs"*, then in such a case the condition is unspecified. Its ruling is dependant on a specified duration. That is, if he takes her to Delhi, just before the expiry of the time specified, then there will be no Talaaq, but if he does not get her there in time, then condition and Talaaq will be effected. [Shaami, page 658, vol.2]

RULING OF A CONDITION PLACED BEFORE THE NIKAH

If for example, someone tells Zaid, *"If you do not join me in my business, then your wife is divorced."* And if Zaid accepts this condition or he makes one similar to this himself, but all this is done before Zaid even gets married, then after he gets married, he cannot fulfil this condition, his wife will **not** be divorced, **because to make a condition of Talaaq before marriage is nonsensical and useless.** It is stated in Shaami, *"His statement to a strange woman is futile, if he tells her, 'You are divorced if you visit Zaid', and he marries her whereafter she visits Zaid thereafter."* [Page 681, vol.2]

THE RULINGS OF KHULA

Khula is also a method of effecting a Talaaq. This occurs where the wife finds it difficult to live with her husband and for some reason or the other he refuses to issue a Talaaq, then she may gain her freedom by means of a Khula. The husband's consent is necessary for Khula. There should be no excesses or oppression in the marriage which necessitate Khula. The Fuqahaa have written that if the husband oppresses the wife and makes her life difficult, then due to this she is forced to make Khula, he should not take anything from her. The wife should as a gesture on her part, forgive the Mehr. There should be no excesses in Khula. The Shariah has stated that it is not permissible for the husband to make lavish and oppressive demands in Khula. If the woman is disobedient and if the fault lies with her, then the couple may come to an amicable agreement with regard to Khula, whereafter she returns to him her Mehr (if he already paid it) or she forgives it (in the case where he has not yet paid her). He may also, if he wishes, ask for her to return the things which he had gifted her with. Nevertheless, such a request would not be appropriate, however, the woman should return his things, so that she may attain her freedom. [Shaami, page 771, vol.2]

WHAT IS 'FAARIGH KHATEE'?

The Fuqahaa have given this to mean a 'deed of divorce'. This is related to Khula. This also effects a Talaaq-e-Baa`in, since it has the same function as a Khula, as stated in Durrul Mukhtaar, under the subject of Khula. [Shaami, page 770, vol.2]

THE RULING OF KHULA MADE UNDER DURESS

If the husband is not pleased to enact a Khula, but due to the pressure of the Islamic State or if he is coerced to carry out a Khula in any other way, then it will be effected. Even if the wife is forced into making Khula, then it will be valid and one Talaaq-e-Baa`in will take effect. [Durrul Mukhtaar]

THE RULING OF MAINTENANCE IN KHULA

With the effecting of Khula any past and outstanding maintenance falls away. However, the maintenance in iddat is still binding upon the husband. This will not fall away, except if they mutually agree thereupon. It is stated in Shaami, *"With the effecting of Khula, all outstanding rights of the Nikah fall away, except the maintenance of iddat and the wife's living quarters. These (rights of hers) will not fall away, except if mutually agreed upon."*

THE RULING OF KHULA WITHOUT THE CONSENT OF THE HUSBAND

It has already been stated that there can be no Khula without the consent of the husband. The Talaaq will not be effected without his cooperation. If he is obstinate and refuses to maintain her or unduly oppresses her, and he refuses to agree on Khula, then in such a case the wife has recourse to a Committee of Ulama or pious elders to effect an annulment, which can effect a Talaaq after thorough investigation in the matter.

KHULA OF AN IMMATURE GIRL

An immature girl can have a Khula effected on her behalf by her father (Shar`i guardian) in exchange for her Mehr

or forgiveness thereof. Such a Khula is permissible and a Talaaq will be effected. [Durrul Mukhtaar]

THE WORD 'TALAAQ' IN KHULA

In a Khula, the mere mentioning of the word '*Khula*' will effect a valid Khula. That is, if he husband says, *"I am contracting a Khula"*, *"I am exchanging this for Khula"*, *"I have made Khula"*, etc.

All this will effect a Talaaq-e-Baa`in. However it will be better to mention the word 'Talaaq', when effecting a Khula, nevertheless, even in the absence thereof, the Khula will be valid and effected. [Shaami]

THE MAS`ALAH REGARDING AN OATH

If the husband takes such an oath, *"I will not come near you (i.e. have intercourse)"*, or *"I will not come to you (for intercourse) for four months"*, then this is called '*Eela*' in the Shariah. The translation of this from the Arabic (which appears in the reference Kitaabs is as follows, "*Wallaahi (I take an oath)! I will not come to you for four months. This is called 'moul' in the Shariah. As Allaah Ta`ala says, 'Those who make eela from their wives, and they wait for four months, if he returns, then indeed Allaah Ta`ala is Most Forgiving, Most Merciful. If he intends Talaaq, indeed Allaah is Al-Hearing Most Knowledgeable."*

Hence after taking such an oath, if he waits until the four months expire and does not go to his wife during this time, then in such a case a Talaaq-e-Baa`in is effected. It is not permissible for him to keep his wife after this without renewing the Nikah.

ANNULMENT OF MARRIAGE AND ITS RULINGS

As has been mentioned earlier, if there is no compatibility between the spouses and their lives have become constrained then there is the avenue of Talaaq. If the husband is obstinate and does not want to divorce her and her life becomes utterly miserable due to his oppression, then if he does not agree to Khula, she has recourse to an annulment. This is only possible if she presents her case to a Shar`i Islamic court or to a Committee of Ulama or pious elders of the Community.

In the Shariah there are only two ways of separation between the spouses – Talaaq or Khula. Nevertheless, if both these avenues fail, then the woman will have recourse to a Shar`i Committee for annulment.

THE RULING OF A SECULAR COURT

If a secular state gives a ruling for annulment, then without any doubt this is not valid in the Shariah. A woman should never ever present her case for annulment to a kuffaar, secular court. Their rulings, even if it happens to be a correct one, will never be accepted by the Shariah. Even if the judge happens to be a Muslim, still too, his ruling will not be acceptable, since he is not au fait with the Shariah and its laws. The right of effecting a Shar`i ruling in accordance to the Qur`aan Majeed and Sunnat is the duty of the Ulama. A secular judge has no such knowledge or right to effect a Shar`i ruling. Even normal practice is such that a doctor cannot carry out the duties of a certified lawyer.

However, certain Ulama have said that if a Muslim judge gives a ruling strictly in accordance to the Shariah, then it will be acceptable.
As for those women who present their cases to a secular court and a ruling of annulment is issued, thereafter she remarries, will be living in a perpetual state of adultery and *haraam*.

MARRIAGE REGISTER

The state has a record of all marriages which are listed therein. This is done purely for administrative and recording purposes. It has no effect on the Shar`i Nikah. The vice of bribery is well practiced all over and some people have an annulment effected by having it registered in this book. It must be known that such an 'annulment' is invalid and has absolutely no Shar`i value or status.

The Shariah only recognises those who are placed in positions of authority by adhering to Shar`i principles and by following the proper Shar`i channels of election or appointment. Secular state elected and chosen officials are of no Shar`i significance and their rulings etc, have no impact on the Shar`i matters.

The rulings of secular state elected officials is not recognised in the Shariah and if such annulments are issued they are not valid and the woman cannot remarry thereafter.

A Shar`i Committee of annulment should have at least three just persons sitting thereon. They should all be knowledgeable and well versed and grounded in Shar`i laws pertaining to marriage and Talaaq. An annulment issued by such a Committee is valid in the Shariah. Since

a secular marriage register annulment is of no consequence and has no value in the eyes of the Shariah, an annulment matter must be brought before a proper Shar`i Committee.

ISLAMIC COURT OR A SHAR`I TRIBUNAL

We will now discuss the matter of a Shar`i court or tribunal, which in our estimation is an important subject, whereby guidance can be offered for handling of cases of Talaaq, etc. where such matters would otherwise be difficult to solve. Hereunder are a few questions which have been answered in somewhat detail.

Here in India we have a Committee which has been set-up to deal with legal issue of the Muslims. They are in the stead of a Muslim court which would be existent in a Muslim State. Their function is to sit on matters dealing with Muslim Personal Law and matter relating to marriage, divorce etc. Their rulings are given in accordance to the Shariah. Every Muslim is encouraged to present their personal matters and problems to this Committee, so that they can regulate their lives in accordance to the Shariah. The under-mentioned subjects are related specifically to the operation of this Committee and without which they cannot function efficiently. Their rulings will also not be in accordance with the Shariah if these matters are ignored.

ANNULMENT OF NIKAH AND ITS REASONS

An annulment of marriage can be effected in any of the under-mentioned situations. This Committee must pay careful consideration to these.

1. The husband is missing completely
2. The husband is absent but whereabouts unknown
3. The husband is incapable of maintaining his wife
4. The husband is unwilling to maintain the wife, notwithstanding his ability to do so

5. The husband oppresses the wife such that he does not fulfil her rights which have been bestowed to her by the Shariah
6. Husband is castrated
7. Husband is impotent
8. The husband becomes insane
9. The husband is afflicted with leprosy or any such ailment which makes living with him difficult
10. Where there is no congeniality in the marriage
11. The choice of an immature when he/she attains maturity
12. Husband or wife become Murtadd (renegade)
13. Foster relationship which only becomes known after Nikah.

These are such reasons, whereby a woman can make an application to a Shar`i court or tribunal for annulment of Nikah. To make an application to any un-Islamic court or arbitrator is Haraam and invalid.

EXPLANATION OF THE ABOVE

1. The husband who is completely missing is that one whose whereabouts are completely unknown to anyone. It is not known whether he is alive or dead. The wife of such a missing man can make an application to a valid Shar`i tribunal (group of Ulama/pious elders) for an annulment of the Nikah.
2. The husband who is absent and whereabouts unknown is that man who is known to be alive, but his whereabouts are unknown. He is sometimes here and sometimes there. In such a case also, the wife has recourse to annulment.

3. If the husband has no wealth or belongings and is unable to support his wife, either due to his not being able to work, or laziness, or he is a drunkard, gambler, etc. then the wife can apply for annulment because it is difficult to live an honourable and decent life with such a man.
4. The husband, notwithstanding his having the wealth and means, but he oppresses the wife and does not support her sufficiently, then such a wife has recourse for annulment.
5. Another valid reason for annulment is where the husband unduly oppresses the wife. He swears and abuses her constantly, and strikes her over and above the Shar`i limit. He also does not fulfil her rights, and makes her life difficult. He makes her life so difficult that there is a definite fear of her being immersed in extreme difficulty and fitnah.
6. Where the husband is castrated. That is, where he either has no penis or it is severed from his body. In such cases also, the wife has the right to ask for annulment.
7. Impotency. That is, where the husband has a penis, but he does not have the ability to effect intercourse or penetration. In such cases also, the wife can apply for annulment.
8. The wife can apply for annulment if the husband becomes insane.
9. Annulment can also be granted in the case where the husband is inflicted with a very severe ailment such as leprosy.
10. In cases where there is no congeniality -- in Math-hab, lineage, profession, integrity, freedom, the wife has recourse to annulment.

11. When a person is married off in childhood, then upon reaching maturity, she has the choice of either maintaining the bond or having it annulled. If a girl is married off by her father or paternal grandfather, then she does not have the choice of cancelling the marriage upon attaining puberty. The only exception will be if the father/grandfather are well-known to have evil traits and characters, or if they are continuous and open faasiqs, or if they effected the Nikah in the state of drunkenness. In such cases the girl will have the choice of cancelling the marriage upon reaching maturity. In all these cases she has the right to apply for annulment. Nevertheless, as mentioned previously, this cannot be effected without a Shar`i court or tribunal. It cannot be achieved in any other way.

For greater details on this, please refer to *'Rahnuma-e-Daar-e-Qadha' and 'Heelatun Naajizah'*.

THE RULING OF A SUPREME COURT and the Shar`i status of maintenance of a divorced woman

The ruling regarding the maintenance of the wife is a unanimous and accepted one, wherein there are no differences of opinion. Nevertheless, the Supreme Court of India has done a great injustice to this facet of Muslim society, and they have effected such great changes with regard to the maintenance of the divorced woman, which the world had not witnessed before. As a matter of fact, the same applies to any secular state, where they have and apply their own man-made 'logic' to resolve matters of maintenance, whereas the divine Law of Allaah Ta`ala is perfect and requires no intervention or interference.

The Shar`i rule regarding maintenance of a divorced woman is simple and uncomplicated. The Shariah has made binding upon the husband to maintain the wife as long as her iddat lasts. Over and above this, the Shariah has not made any demands on the husband. He may give whatever his heart desires and he is able to. A ruling was given in the Supreme Court to the effect that the husband must maintain his wife even after the expiry of her iddat. This is completely in contravention of the Islamic Shariah. This ruling is even contrary to the reasonable intellect. But the highest court of the land has seen fit to grant maintenance to the wife until she remarries or dies. This ruling was incorrect and its promulgation has angered and saddened the Muslim Community. Nevertheless, since this ruling was incorrect, what is the Shar`i ruling in such cases? This has been answered in somewhat detail hereunder.

A SURVEY

Regarding the maintenance of the divorced woman, right from the time of Nabi (sallallahu alaihi wasallam) until today, thousands of women have been divorced but no court has ever ruled that her maintenance continues after iddat. Neither has the husband been forced into such a situation, where he has to provide for her even after completion of iddat. We note from the life of Nabi (sallallahu alaihi wasallam), where during his era, there were many cases of divorce and maintenance was always granted only until the expiry of the iddat. There were many cases at that time where the woman had no source of income other than the maintenance of the husband, but notwithstanding this, no one was granted maintenance beyond the iddat period. The rank and status which Islaam has granted and afforded to women is beyond comparison, the world over. Throughout the history of Islaam, thousands of women have been divorced and all of them have been afforded maintenance only during their iddat. None of them ever complained and they all accepted it, since this acceptance was a display of their Imaan and acceptance of the divine code of life. In fact, there are innumerable cases where the woman waived their right to maintenance during iddat due to their husband's constrained circumstances. They have all accepted the Shariah as it is and did not raise their voices in protest. Allaah Ta`ala says in the Qur`aan Majeed, ***"There is no scope for any believing man or woman to have any choice in a matter after Allaah and His Rasool have decreed it. That person who does not accept the ruling of Allaah and His Rasool, is on clear deviation."***

From this Aayat it is clear that the basis of Imaan lies in acceptance of the Law of Allaah Ta`ala and Nabi (sallallahu alaihi wasallam).In this lies the salvation of both the worlds.

THE REALITY OF "MATAA`UM BIL MA`ROOF"

The Supreme Court quoted the Aayat, "***And for the divorced women, is mataa`am bil ma`roof, which is the right upon the believers***", as a proof for their ruling. Many diverse translations were offered for the above Aayat, but only that translation will be accepted and considered which is effected in the light of the Ahaadith and by the Sahaabah (radhiallahu anhum). The reason being that the group of Sahaabah (radhiallahu anhum) were the initial ones who understood the Qur`aan Majeed. The Ahaadith warns greatly against opting for the view and opinions of others over and above that of the Sahaabah (radhiallahu anhum). We will now present a few reliable and authentic interpretations of the above Aayat so that everyone may properly understand the true import thereof.

RELIABLE AND AUTHENTIC TRANSLATIONS AND INTERPRETATION

One of the greatest Mufassireen of the 14th century, Hadhrat Moulana Ashraf Ali Thaanwi (rahmatullahi alaihi) translates this Aayat as follows, "*And for every divorced woman, she should be benefited in accordance to the specified system. This is upon the pious believers.*"[Bayaanul Qur`aan, page 141, vol.1]

Hadhrat Sheikhul Hind, Moulana Mahmoodul Hasan (rahmatullahi alaihi) translates it as follows, "*For the divorced women, to spend on them in accordance to the*

specified rules, is binding upon the pious believers." Discussing this Aayat further the question of a set of clothes arose. He states that for the husband to purchase a set of clothes for the divorced wife is Mustahab and not binding.

The famous Mufassir, Haafiz Tibri (rahmatullahi alaihi) states, *"The person who had divorced his wife, should afford her some benefits, that is, together with the maintenance of the iddat, he should purchase some clothes for her before sending her off."* Explaining this subject in more detail he states that a correct and civil thing would be for the husband to benefit his divorced wife with (at least) a set of clothes. [Page 343, vol.2]

In explaining the above Aayat, Haafiz Ibn Katheer (rahmatullahi alaihi) states that there are two views on the Aayat. One is that it is necessary for every divorced woman to be benefited with *'Mat`a' (explanation to follow later on)*, and the other is that this *'Mat`a'* is only for those women who have not even had an occasion to be in isolation with the husband and her Mehr was not specified. [Page 298, vol.1]

The author of *Roohul Bayaan* states, *"The word 'Mataa`un (in the Aayat) refers to 'Mat`a'.* It is either Waajib or Mustahab. It is Waajib for that woman who has not had isolation with her husband and her Mehr amount was not specified. And for all other woman it is Mustahab (upon the husband). [Page 298, vol.1]

Allamah Sayed Mahmood Aaloosi Baghdadi (rahmatullahi alaihi), the author of *Roohul Ma`ani*, states, *"The word 'Mataa`un' refers to 'Mat`a'. Waajib and*

Mustahab are both included herein." In his explanation he has also taken it to refer to maintenance during *iddat*, as the other Mufassireen. [Page 16, vol.2]

It is stated in *Fathul Bayaan, "The word 'Mataa`un' refers to 'Mat`a' and maintenance during iddat."*[Page 320, vol.2]

The author of *Mudaarik-e-Tanzeel*, states, *"The word 'Mataa`un' refers to a fair and common maintenance during iddat. That is, one which is not contrary to the Shariah."* [Page 98]

The author of *Tafseeraat Ahmadiyah* states, *"The word 'Mataa`un' refers to maintenance during iddat. This applies regardless of whether the Talaaq is Baa`in or Raj`i. It is understood from the Hadith that it is necessary to maintain the wife during iddat."* [Page 127]

The famous Mufassir, throughout Egypt and the Arab world, Allamah Muhammad Abdah, states in his Tafseer, *"That 'Mat`a' is Waajib for the Ghair Madkhool Beha has already passed. Now in this Aayat, Allaah Ta`ala is instructing all others to benefit their divorced wives in some way or the other. However here, and it is the preferred view, that it is not Waajib, rather it is Mustahab and better."*

The above-mentioned Mufassireen are well-known and reliable personalities throughout the Muslim world. This interpretation of the said Aayat is what has been transmitted to the Ummat from the era of Nabi (sallallahu alaihi wasallam). From all the above, two things have been established for the word *'Mataa`un'* and that is that

it refers to *'Mat`a'* and maintenance during iddat. *'Mat`a'* is Waajib for that *Ghair Madkhoolah* woman who did not even have an isolation with her husband and her Mehr was not stipulated, and it is Mustahab for other women. That is, those women who are *Madkhoolah Beha,* they are to receive their maintenance during iddat and their due Mehr and the husband should preferably benefit them a bit extra during this time as well.

It has been established from the above that over and above the specified maintenance for the divorced wife, nothing extra is binding upon the husband. It is entirely up to the husband what he decides to gift his ex-wife, over and above the usual maintenance. Nothing here has been made obligatory upon him. To afford a lifetime maintenance to a divorced woman and then to quote this Aayat as a proof, is a severe interpolation into the Deen.

EXPLANATION OF 'MAT`A'

Although there is a difference of opinion amongst the Ulama regarding the actual limit of *'Mat`a',* the agreed upon limit is a set of clothes with a scarf, which is in accordance to the means of the husband. This is the view of the majority of the Ulama. This was also the practice during the era of Nabi (sallallahu alaihi wasallam), as noted from the Tafseer of Hadhrat Ibn Abbaas (radhiallahu anhu). The entire Mas`alah is solved by the condition of *"Ma`roof"* (which appears in the Aayat), which refers to a well-known, customary and general benefit, which is not contrary to the Shariah. [Madaarik, page 95]

There is no part of the Shariah which has something distasteful. It is clear that *"Mat`a"* must be such that it is

not an undue burden on the husband, which he is unable to easily fulfil. It must not be something which is not proven to be so from the Shariah and also according to common practice. The condition of *'Ma`roof"* has also been placed there for this reason that it is not something which is contrary to the Shariah or excessive.

Hence to interpret the word *"Mataa`un"* and isolate it from the word *"Ma`roof"* would be a great disservice to the Deen and completely in contravention of the Desire and import of Allaah Ta`ala.

THE ISLAAMIC SYSTEM OF MAINTENANCE

Maintenance is also one of the obligatory duties specified in the Shariah. Allamah Ibn Nujaim, the author of Bahrur Raa`iq states, *"There are three avenues where the Shariah has made maintenance obligatory, the first is in close relations, second, marital relation and third on one's possessions.*" He states further, *"The restraint and restriction on one's subordinates/subjects makes the maintenance for them Waajib. Since someone is being restricted in order to fulfil another's rights, hence their maintenance is Waajib upon the one who is restraining them.*" [Page 188, vol.4]

Maintenance will not be Waajib if any one of the three reasons are not found. The divorced woman becomes a stranger for the husband. She now can do and go where she pleases, after the completion of the iddat, but during the iddat, her maintenance is binding upon the husband. Nevertheless, after the completion of the iddat they will be like strangers to each other and their relation will be likewise. The Shariah has not made maintenance binding for a strange husband upon a strange woman. As a matter

of fact, there is no law or custom the entire world over, where maintenance is binding for one strange person upon another, where there exists no family bond. The author of Bahrur Raa`iq states, *"Since there no longer exists any relationship between the husband and wife, then no type of maintenance is binding upon the husband."* [Page 194, vol.2]

There is no religion or system which is more sympathetic (to the plight of the weak and oppressed) than Islaam. In fact, the Fuqahaa have even gone to the extent of stating that if the husband gives extra maintenance to the wife after the iddat period expires, then it is necessary for her to return the same, since it is his right. [Ibid]

SUCH MAINTENANCE IS HARAAM

In the discussion of maintenance, this much also has to be considered that which of it is *halaal* and which *haraam*. What is the ruling of that maintenance which the husband is made to give grudgingly after the expiry of his wife's iddat?

There is absolutely no doubt in this fact that such maintenance will be *haraam* for the wife to consume. According to the Fuqahaa, such wealth is in the category of usurped wealth and it is spurious. It is obligatory for her to return that wealth to him. Allaah Ta`ala states clearly in the Qur`aan Majeed, *"And do not eat the wealth of one another wrongfully..."* [Aayat 188, Surah Baqara]
In another Aayat it is stated, *"O people of Imaan! Do not consume the wealth of others wrongfully..."* [Aayat 29, Surah Nisaa]

From this we understand that to purposely usurp and consume the wealth of others, is a great sin. Such wealth has also been classified as *haraam* in the Ahaadith. Two people came to the presence of Nabi (sallallahu alaihi wasallam) with some monetary dispute. Nabi (sallallahu alaihi wasallam) told them, *"See here, I am also a human being. You people present your disputes to me, whereas some of you are glib-tongued and very convincing. I listen to your talk and give a ruling in accordance to the apparent factors. Nevertheless, you must remember that if I grant a ruling where the right of your brother is affected (due to your sweet-talk and lies), then do not forget that your taking this (right which belongs to your brother) is like you are taking a piece of The Fire."* [Mishkaat Shareef, page 327]

If one wrongfully attains a right which belongs to another, due to a court or other ruling, then one must remember that this ruling does not cleanse the sin or validate anything. That thing is still *haraam*, even though the ruling given will be correct since it is based on apparent factors. If the ruling of Nabi (sallallahu alaihi wasallam) did not make a *haraam* acquired right *halaal*, what can be said of the rulings of the courts of today? The rulings of the Supreme Court, which awards *haraam* maintenance to the estranged wife after iddat, remains *haraam* and will never become *halaal* until the Day of Qiyaamah. This wealth is in the category of usurped wealth, which is *haraam* to consume. The author of *Badaa'i Wa Sanaa'i* states that to take the wealth from its owner without his consent and happiness is defined as *Ghasab (usurping)*. Imaam Shaafi (rahmatullahi alaihi) states that to take the wealth of any person without his happiness is regarded as *Ghasab*. [Badaa'i, Page 143, vol.4]

It is stated in *Hidaaya* that to take the wealth of someone without his (the owner's) consent is considered as *Ghasab*.

In the light of the aforegoing, it is clear that the maintenance which is extracted from the husband, beyond the iddat period, is usurped wealth and most definitely *haraam*.

PLACING A CONDITION OF, 'UNTIL A SECOND NIKAH'

This condition which was placed by the Supreme Court is nothing other than blatant profanity. The short-sightedness in this is glaring, to say the least. The greatest loser in all this is the poor, deficient in intelligence, woman, who will now have the door of Talaaq closed up on her. The husband when he looks at the probability of having lifetime maintenance slapped on him, will think twice before effecting a Talaaq. The lives of both the husband and wife will then become very constrained, since they will have to put up forever with a partner, with whom they virtually hate. This will naturally open the doors to all sorts of vice and immorality.

The reality of the situation is that with a ruling like this, which woman will even decide to remarry, when she has free maintenance coming to her without any effort or worry? Almost all divorced women will opt for sitting idle and single for the rest of their lives. And then what about those women who are over 40 years of age? The prospect of a second marriage is nigh impossible. The poor husband stands to lose all the way, with such preposterous rulings and laws. The condition of *"Until a*

second marriage" will almost certainly lead to *until death.*

And then we have to look at the condition of the poor husband. After he carries out a permissible act of divorcing his wife, he now has to sit with the problem of maintaining her for life. What will the Supreme Court do if he is financially unable to maintain this estranged wife? Will he be imprisoned? The Shariah has not stipulated imprisonment for that husband who is genuinely unable to provide for his estranged wife during her iddat, which is his Waajib duty. Even if he is imprisoned, of what benefit will this be to the estranged woman? Who is there to sympathise with her or to see to her needs? The State will now have to support this woman.

The Supreme Court should have placed this condition, that the estranged wife work for the husband as a normal worker (maid, etc.), so that at least he is deriving some sort of benefit for the 'maintenance' that he is handing out to her. After she remarries, then she is free to leave the job and go away. Naturally the Supreme Court will not accept such a condition.

A FINAL QUESTION

In closing this discussion one question is left to be answered. Since the Shariah has stipulated that a woman is only to be maintained for the duration of her iddat, what is to happen to the poor lady thereafter?

Before answering this question, we wish to make a point, which is that in all the past fourteen centuries, from amongst all the thousands (millions!) of women who were divorced, how was their problem solved? Did they all die

without any food, or did they live? Who was it that supported them through this time? Did they find no sympathisers and assistance?

If one contemplates over these questions with an open and rational mind, then one0 will easily realise that no slur or blame can be placed on the Shariah.

Providence (*Taqdeer)* is stipulated for each and every person. Allaah Ta`ala sees to all His creations. There were many instances where the estranged wife received more and lived a much better life than she did with her husband. Some even had to endure difficult and constrained times. If the husband has to pass away, then too the same question will arise. Allaah Ta`ala forbid, but will we also at that time put blame and question Allaah Ta`ala with regard to maintenance? If one or two women undergo difficult times, will it then be proper to make this a basis for perpetual griping and censure of the Shariah? Many a women endure difficult times even with spouses. Does every married woman enjoy happy and contented times? In the sight of the Shariah, every divorced woman is equal. Without exception, maintenance is Waajib for all of them as long as the iddat lasts. The Shariah also encourages that she remarry the husband in that iddat period. Alternatively, the Shariah has made obligatory her maintenance and support upon her mature son. If she has no son, then her parents. If they are not alive, then her brothers. If there are no brothers, then her paternal uncles, or their children. In this way the Shariah has formulated a system of support for such women in dire circumstances. [Badaa`i, page 34, vol.4]

This is also explained in *Hidaaya*, page 426, vol.2.

If there is a dire need, then the divorced woman can compel these relatives to support her (through a Shar'i court). [Hidaaya, page 427, vol.2]

If, Allaah Ta'ala forbid, this woman has no such relatives, then the duty of supporting her lies with the Muslim Community. If the country is a Muslim country, then there is the system of a *Baitul Maal*, wherefrom she will be supported and assisted. Even though such cases are rare, nevertheless, the Shariah has accommodated and specified such measures.

USWAH-E-SAHABIYAT

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